84-518



No. _____

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT W. JOHNSON, et al.
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, et al.
Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

Does the federal civil service retirement statute, 5 U.S.C. §8335(b), which, in part, authorizes involuntary retirement of federal firefighters at age 55, establish as a matter of law that age 55 is a bona fide occupational qualification under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et. seq.*, for non-federal firefighters nationwide?

## PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit included:

Robert W. Johnson, August T. Stern, Jr., Thomas C. Doyle, Mitchell Paris, Robert L. Robey and James Lee Porter

and

Equal Employment Opportunity Commission

Appellees

v.

Mayor and City Council of Baltimore

Appellants

and

Hyman A. Pressman, as Chairman, and Donald D. Pomerleau, Calhoun Bond, Edward C. Heckrotte, Sr., Charles Daugherty, Paul C. Wolman, Jr., and Curt Heinfelden, as Members of the Board of Trustees, Fire and Police Employees Retirement System of the City of Baltimore.

Defendants



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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Robert W. Johnson, August T. Stern, Jr., Thomas C. Doyle, Mitchell Paris, Robert L. Robey and James Lee Porter, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on April 4, 1984, and rehearing denied on June 30, 1984.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 731 F.2d 209, rehearing *en banc* denied, _____ F.2d _____ (4th Cir. 1984) (Reprinted herein as Appendix A.). The opinion of the United States District Court for the District of Maryland is reported at 515 F. Supp. 1287 (D.Md. 1981) (Reprinted herein as Appendix B).

## JURISDICTION

The judgment of the court of appeals (App. A.) was entered on April 4,1984. Rehc[illegible] banc was denied on June 30, 1984. Jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* (1976 and Supp. II 1978); Federal Civil Service Law, Government Organization and Employees, Chapter 83-Retirement, 5 U.S.C. §8335(b); and Fire and Police Employee Retirement System of the City of Baltimore, Baltimore City Code, Article 22, Section 29, *et seq.* (Relevant provisions reprinted in Appendix C).

## STATEMENT OF THE CASE

The Fire and Police Employee Retirement System of Baltimore City, Article 22, §34(a)(2) and (4) of the Baltimore City Code, mandates the retirement of certain firefighting personnel at ages 55 and 60, depending on the date they entered the department service and the number of years they have been in the service. Petitioners, six Baltimore City firefighters, brought this action in the United States District Court for the District of Maryland, challenging this mandatory retirement provision under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 *et seq.* (1976 and Supp. II 1978) (hereinafter referred to as "ADEA") and the Fourteenth Amendment to the United States Constitution. Federal jurisdiction was conferred pursuant to 29 U.S.C. §§626(b), 217.

A non-jury trial was held before the Honorable Alexander Harvey, II, United States District Judge. Respondents, Mayor and City Council of Baltimore, et al. (hereinafter referred to as "the City") asserted the bona fide occupational qualification exception



(hereinafter referred to as "BFOQ") established under the ADEA in support of its mandatory retirement age requirements. Detailed and exhaustive expert testimony and other evidence were presented at the six-day trial on the BFOQ issue, to determine whether it was impossible or highly impractical to deal with the retirement of firefighters between ages 60 and 65 on an individual basis.

On June 9, 1981, the district court issued its decision rejecting the City's BFOQ defense and concluding that the City Ordinance violated the ADEA. The Court found that the six plaintiff firefighters could safely and efficiently perform their jobs beyond age 60, or that the City, through testing, could identify those who were unfit. *Johnson v. Mayor and City Council of Baltimore*, 515 F.Supp. 1287, 1300-01 (D.Md. 1981). On August 13, 1981, a Judgment and Decree consistent with the Court's opinion were filed.

The City filed an appeal with the United States Court of Appeals for the Fourth Circuit.[1] A divided panel of the Fourth Circuit reversed the concededly "thorough and impeccably reasoned opinion" of the court below. *Johnson v. Mayor & City Council of Baltimore*, 731 F.2d 209, 213 (4th Cir. 1984). The panel majority did not disagree with the district court's finding that firefighters could safely and efficiently perform their jobs beyond age 60, or that those who are unfit could be identified through testing. Rather, relying on this Court's language in *EEOC v. Wyoming*, 460 U.S. 226, 240 (1983), the majority stated that it "must initiate a search for a 'reasonable federal standard' by which to test whether age is a BFOQ for the City of Baltimore firefighter." 731 F.2d at 212. The majority found the standard to be embodied in a United States civil service statute, 5 U.S.C. §8335(b), "mandating retirement as a general matter at fifty-five for federal police and firefighting employees." 731 F.2d at 212-13. Contrary to the circuit courts' direction that the BFOQ exception to the ADEA be adjudicated on a case-by-case basis, the majority concluded that "Congress' own reasonable federal standard" of age 55 as the mandatory retirement age for federal firefighters, establishes as a matter of law that age 55 is a BFOQ under the ADEA for all non-federal firefighters nationwide. 731 F.2d at 213.

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[1] The City also filed with this Court a Petition for Writ of Certiorari to review the judgment of the United States District Court for the District of Maryland before judgment in the Court of Appeals because of the constitutional issues then pending before this Court in *EEOC v. Wyoming*, 514 F.Supp. 595 (D.Wyo. 1981) *rev'd* 460 U.S. 226 (1983). This Court denied certiorari, 455 U.S. 944 (1983).

Petitioners filed a Petition for Rehearing with Suggestion for Rehearing *En Banc*. On June 30, 1984, a divided (6-3) Fourth Circuit denied Petitioners' request for rehearing.

## REASONS FOR GRANTING THE WRIT

### I.

### THE LOWER COURT'S HOLDING THAT THE MANDATORY RETIREMENT LAW COVERING FEDERAL FIREFIGHTERS ESTABLISHES AGE 55 AS A *PER SE* BFOQ FOR ALL NON-FEDERAL FIREFIGHTERS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH MUST BE RESOLVED BY THIS COURT.

Congress has declared that the purpose of the ADEA is to "promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. §621. Although the Act prohibits employers from relying solely upon age as a measure of individual ability, the Act permits the use of age as an employment criteria where age is a BFOQ reasonably necessary to the normal operation of the particular business. 29 U.S.C. §623(f)(1). As of the present date, this Court has not established the test to be applied in determining the existence of an age-based BFOQ.

A. *The Fourth Circuit Miscontrued the Meaning of the "Reasonable Federal Standard" Referred to by this Court in EEOC v. Wyoming.*

In *EEOC v. Wyoming*, 460 U.S. 226 (1983), this Court held that the extension of the ADEA to state and local governments does not violate the Tenth Amendment to the United States Constitution, since the ADEA's BFOQ exemption provides an adequate safeguard against any impermissible federal interference. All that the ADEA requires, this Court emphasized, is that the State, in achieving its goals of assuring the physical preparedness of its employees to perform their duties, do so "in a *more individualized and careful manner* than would otherwise be the case." 460 U.S. at 239 (emphasis added). Thus, the state may assess the fitness of its employees and dismiss those "whom it reasonably finds to be unfit." *Id.* In explaining the scope of the ADEA and the requirement placed on the states under the Act, this Court stated as follows:



> "Perhaps more important, Appellees remain free under the ADEA to continue to do precisely what they are doing now, *if they can demonstrate that age is a 'bona fide occupational qualification'* for the job of game warden . . . Thus, in contrast to the situation in *National League of Cities* [citations omitted], even the State's discretion in achieving its goals in a way it thinks best is not being overridden entirely, but is merely being *tested against a reasonable federal standard.*"

*Id.* (emphasis added). Accordingly, this Court remanded the *Wyoming* case for a trial to test whether mandatory retirement at age 55 is a BFOQ for Wyoming state game wardens.

As noted above, this Court has not established any specific BFOQ test. The circuit courts, however, have developed a two-prong test which an employer must meet to establish the BFOQ defense. This test, while neither expressly adopted nor rejected by this Court, has been recognized and cited by its members. *See, e.g., EEOC v. Wyoming*, 460 U.S. at 257-58 (Burger, C.J., dissenting).

In *Arritt v. Grisell*, 561 F.2d 1267 (4th Cir. 1977), the Fourth Circuit explained that an employer satisfies the BFOQ test if it extablishes:

> "(1) That the BFOQ which it invokes is reasonably necessary to the essence of its businesss . . . and
>
> (2) That the employer has reasonable cause, i.e., a *factual basis* for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it would be impossible or impractical to deal with persons over the age limit on an individual basis."

567 F.2d at 1271 (emphasis added). *See also Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). Thus, to avoid liability under the ADEA, *Arritt* and its progeny instruct that the employer in all cases must demonstrate, by objective and credible evidence, that its age-based employment decision qualifies as a BFOQ necessary to the normal operation of the particular business. Each case must be separately adjudicated and resolved on the evidentiary record established at trial. See *Touhy v. Ford Motor Co.*, 675 F.2d 842, 845-46 (6th Cir. 1982).

The Fourth Circuit's decision in the instant case runs entirely afoul of this two-prong BFOQ test. The court, in essence, created an exception to this test and explained that it is not necessary to apply the required factual analysis in determining whether a BFOQ exists with respect to firefighters. Believing that "(t)he question appears to be the same when raised for firefighters, in San Francisco or in Baltimore," the court explained that "(t)he situation may not fit the intended accommodation of differing factual circumstances lending themselves to a case-by-case resolution." 731 F.2d at 215. Rather, the Fourth Circuit explained that in light of the *Wyoming* decision, where this Court stated that "the State's discretion is merely being tested against a reasonable federal standard," the courts now "must initiate a search for a 'reasonable federal standard' by which to test whether age is a BFOQ for the City of Baltimore firefighter." 731 F.2d at 212. The Fourth Circuit then held that Congress made its search a simple one, by providing the standard. Relying on the federal retirement statute for law enforcement and firefighting employees of the federal government, 5 U.S.C. §8335(b), which mandates retirement for federal firefighters and various other federal employees at age 55, the Fourth Circuit concluded that Congress has established "a reasonable federal standard by which to measure firefighting in the City of Baltimore." 731 F.2d at 213. Thus, the court observed that Congress has legislatively answered the question that age 55 is a BFOQ for Baltimore City firefighters as well as all firefighters nationwide.

The Fourth Circuit attempted to distinguish the fact pattern in this case from that in *EEOC v. Wyoming*, which involved a mandatory retirement age of 55 for state game wardens. The court stated that unlike firefighting, where Congress by enacting 5 U.S.C. §8335(b) has determined age 55 to be the federal standard at which such employees should retire, there exists no comparable federal statute "in-



sofar as federal game wardens are concerned." 731 F.2d at 213 n.11, 215 n.19. The federal and *Wyoming* statutes reveal that this conclusion is factually and legally incorrect.

By statute, game and fish wardens of the State of Wyoming are defined as "law enforcement officers." §9-3-190(a)(vii) and §7-2-101, Wyoming statutes (1977). They are authorized to make arrests and enforce criminal violations of Wyoming game and fish laws. §23-6-101, Wyoming statutes (1977). This Court noted that these employees are law enforcement officers of the State of Wyoming. *See* 460 U.S. at 235, 241 n. 15.

Similarly, federal game wardens are considered "law enforcement officers" as defined in 5 U.S.C. §8331(20). Like federal firefighters, federal law enforcement officers, including federal game wardens (now classified as "Special Agent (Wildlife)"), must retire at age 55 pursuant to 5 U.S.C. §8335(b). Thus, contrary to the Fourth Circuit's understanding, there *is* a federal statute governing the mandatory retirement of federal game wardens. Moreover, this is the identical statute and provision which mandates the retirement of firefighters, and which was relied upon by that court in its conclusion that Congress had legislated a federal standard for the retirement of firefighters, but had not done so for federal game wardens.

The Fourth Circuit's opinion finding a *per se* BFOQ for mandatory retirement of Baltimore City firefighters at age 55, evidences its total failure to understand this Court's analysis in *Wyoming*. This Court never even suggested that in each case where an employer raises the BFOQ defense, the court must search for some reasonable federal standard against which to scrutinize the age based decision. Rather, by the statements quoted above and by remanding the *Wyoming* case for a trial on the BFOQ issue, this Court indicated that the ADEA has already extablished a reasonable federal standard—"the bona fide occupational qualification reasonably necessary to the normal operation of a particular business." 29 U.S.C. §623(f)(1). Moreover, the circuit courts have developed a single BFOQ test which is to be applied in the same manner in all cases, whether the employees be Wyoming game wardens, Los Angeles helicopter pilots or Baltimore City firefighters. Reliance on any other standard or guideline without analysis under the BFOQ test is impermissible under the ADEA.

B. *The Fourth Circuit Disregarded the Wyoming Decision where this Court Rejected the Argument that Congress Has Established a Per Se BFOQ for Certain State and Local Government Employees.*

This Court in *Wyoming* was fully aware of the federal civil service laws, including 5 U.S.C. §8335(b), that authorizes retirement of certain federal employees before age 70. *See* 460 U.S. at 263 (Burger, C. J., dissenting). In its brief to this Court, the primary argument advanced by the state of Wyoming was that the Court should recognize the "federal model" of age 55 for the mandatory retirement of federal law enforcement officers established by Congress in 5 U.S.C. §8335(b), and should apply that standard when scrutinizing mandatory retirement provisions applicable to comparable employees of state and local governments. Emphasizing that its game wardens are law enforcement officers, Wyoming argued that "Congress has never expressed an intent that law enforcement officers be retained in employment until age 70." *See EEOC v. Wyoming*, 460 U.S. 226 (1983), Brief of Wyoming at 11 through 14. Rather, the mandatory retirement age of 55 found in 5 U.S.C. §8335(b) is a "statement of Congressional policy," Wyoming explained, and should be given due deference. Moreover, Wyoming urged that "if it is reasonable for Congress to require law enforcement officers to retire at age 55, it is not 'arbitrary' for the states to do the same." *Id.* at 16.

The EEOC also briefed this issue in *Wyoming*. Noting that although the District Court deemed it significant that Congress preserve mandatory retirement provisions for certain federal law enforcement offices in 5 U.S.C. §8335(b), that exemption was the product of an agreement to provide the congressional committee the opportunity to review the mandatory retirement provisions, particularly since most of these provisions are part of liberalized retirement programs. *See, EEOC v. Wyoming, supra,* Brief of EEOC at 9-20 n.10.[2] Thus, the EEOC concluded that:

[2] Congress enacted 5 U.S.C. §8335(b) in 1974. Pub.L. 93-350, 8 Stat. 356 (1974). During the course of amending the ADEA in 1978, Congress decided to retain §8335(b) and similar federal statutes. That decision, however, was simply the product of an agreement to provide the committees having jurisdiction over the retirement programs at issue with the opportunity to review the statute's mandatory retirement provisions. *See Vance v. Bradley*, 440 U.S. 93, 97 n. 12 (1979).



> "Congress' failure to eliminate mandatory retirement provisions affecting federal law enforcement personnel provides no basis for discounting the significance of the federal interest in prohibiting age discrimination . . ."
> *Id.*

Footnote 2 continued

During consideration of the 1978 amendments to the ADEA in the House, Representative Spellman offered an amendment on behalf of the House Post Office and Civil Service Committee (123 Cong. Rec. 30556 (1977), *EEOC Legislative History of the Age Discrimination in Employment Act*, 415):

> "To continue in effect those mandatory retirement provisions which are applicable to specific civil service occupations such as air traffic controller, law enforcement officer and firefighter.
>
> * * * *
>
> I hasten to point out that this amendment does not indicate opposition perse [sic] to elimination of mandatory retirement for air traffic controllers, firefighters, and other specific occupations.
>
> However, since most of these mandatory retirement provisions are part of the liberalized retirement program, our committee believes that such provisions should not be repealed until the individual retirement programs have been reexamined."

Representative Hawkins, in agreeing to this amendment offered by Representative Spellman, stated (*id.*):

> "By this action we are reaffirming the mandatory retirement ages in the statutes applicable to these positions. The sole purpose of this Agreement is to afford the committees the opportunity to review these statutes."

It is therefore clear that Congress did not intend §8335(b) to operate as a legislative BFOQ for the federal personnel governed by that Section, much less their state and municipal counterparts. Indeed, the very existence of §8335(b) is merely being tolerated by Congress, pending committee review, because its mandatory retirement provisions are integrally related to "liberalized retirement programs" for the federal personnel affected.

This Court considered these arguments and rejected Wyoming's contention that 5 U.S.C. §8335(b) established a federal standard governing mandatory retirement of all law enforcement officers. Recognizing, as the EEOC's brief noted, that there may be a number of reasons why Congress chose to retain the mandatory retirement age for certain federal employees, it cannot be assumed that Congress applied a BFOQ analysis, or that its reasons would withstand BFOQ scrutiny, or that it intended, in some way, to limit its federal interest in prohibiting age discrimination with respect to certain employees. Accordingly, this Court stated in footnote 17, the following:

> "We note, incidentally, that the strength of the federal interest underlying the Act is not negated by the fact that the federal government happens to impose mandatory retirement on a small class of its own workers . . . . Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decision making a conclusion that Congress was insincere in that declaration and must from that point on evaluate the sufficiency of the federal interest as a matter of law rather than of psychological analysis."

460 U.S. at 242-43 n. 17. The case was remanded for a full evidentiary trial on the issue of whether age 55 is a BFOQ for Wyoming's game wardens. In so doing, this Court indicated that the retirement statute for federal "law enforcement officers" did not establish a *per se* BFOQ for their state and municipal counterparts. Otherwise, a remand would have been unnecessary. *See Walston v. School Board of City of Suffolk*, 566 F.2d 1201, 1205 (4th Cir. 1977); *Cherokee Nation v. State of Oklahoma*, 461 F.2d 674, 676-78 (10th Cir.), *cert. denied*, 409 U.S. 1039 (1972).

In his dissenting opinion below, Chief Judge Winter noted the significance of footnote 17 and explained, "*Wyoming* . . . tells us that the broad requirements of the ADEA are not to be constricted as a matter of law by what treatment Congress has afforded it to comparable federal employees. Stated otherwise, the fact that Congress may require some federal firefighters to retire at age 55 does



not excuse Baltimore from proving the facts necessary to satisfy 29 U.S.C. §623(f)(1) [BFOQ]." 731 F.2d at 218 (Winter, C. J., dissenting). *See also EEOC v. County of Los Angeles*, 706 F.2d 1039, 1041-42 (9th Cir. 1983), *cert. denied*, _____U.S._____, 104 S.Ct. 984 (1984)(recognizing that the federal standard argument was considered and rejected by the Supreme Court in *Wyoming*). Significantly, the Fourth Circuit failed to even acknowledge, let alone attempt to reconcile footnote 17 of the *Wyoming* decision.

C. *The Text of 5 U.S.C. §8335 Does Not Support the Conclusion that Age 55 is a BFOQ Even for Federal Firefighters.*

Finally, as explained above, a specific mandatory retirement age is deemed to constitute a BFOQ where it can be demonstrated that at a certain age firefighters can no longer be relied upon to safely and efficiently perform their jobs. The Fourth Circuit below held that age 55 is a BFOQ for all firefighters nationwide, since Congress had determined that federal firefighters must retire at age 55. This conclusion, however, reveals the Fourth Circuit's misinterpretation of the statutory scheme of the federal retirement statute.

5 U.S.C. §8335(b) requires the mandatory retirement of a federal firefighter at age 55, only if that employee has completed 20 years of service. If he has not, he may remain in the federal fire service until he has completed 20 years. Moreover, this federal statute provides that the agency head may retain a federal firefighter until that employee becomes 60 years of age, and further, that the President may exempt an employee from automatic separation under §8335(b) when he determines the public interest so requires. 5 U.S.C. §8335(d). Thus, as Chief Judge Winter observed in his dissenting opinion below, this statutory scheme provides no support for the Fourth Circuit's conclusion that §8335(b) establishes age 55 as a BFOQ, or the age at which firefighters can no longer be relied upon to safely and efficiently perform their jobs. The Fourth Circuit's decision, therefore, is totally misplaced and must not be left unreviewed.

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The inevitable consequences of the Fourth Circuit's interpretation of the BFOQ exception to the ADEA are far reaching. It affects all cases brought under the ADEA challenging age-based employment decisions for state and local government employees such as firefighters, police, deputy sheriffs, jail matrons, and turnkeys, and

possibly may be extended to other occupations where mandatory retirement ages have been legislatively created by Congress. Such an effect would totally undermine the purpose of the ADEA, to make individualized judgments regarding the ability of older workers, and to avoid age stereotyping. Furthermore, the opinion leaves both practitioners and trial courts alike in a quandary as to whether the BFOQ issue, in such cases, has been legislatively settled by Congress or whether a full evidentiary trial, scrutinizing the facts on a case-by-case basis, is necessary to establish this defense.

Accordingly, it is imperative that this Court issue a writ of certiorari to clarify the BFOQ analysis applicable to state and local government employees, and to resolve the critical federal issue of whether federal civil service statutes setting age 55 as the mandatory retirement age for certain federal employees establishes a *per se* BFOQ for all non-federal employees in similar occupations.

## II.
## THE FOURTH CIRCUIT'S DECISION IN THE INSTANT CASE CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS WHICH HAVE REJECTED THE FEDERAL STANDARD/*PER SE* BFOQ THEORY.

The only other courts of appeals to consider the relevance of federal statutes establishing mandatory ages for federal employees to the BFOQ exception of the ADEA have rejected the Fourth Circuit's conclusion in the instant case. *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir. 1983), *cert. denied*, _____ U.S. _____, 104 S.Ct. 484 (1983); *EEOC v. County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983), *cert. denied*, _____U.S._____, 104 S.Ct. 984 (1984); *Heiar v. Crawford County, Wisconsin*, _____F.2d_____, Case Nos. 83-1872, 83-2149, 83-2166, 83-3139 (7th Cir. Aug. 20, 1984).

In *Orzel*, an assistant fire chief challenged the City's action in terminating his employment upon reaching age 55, the mandatory retirement age for all "protective service" employees. The City contended that its policy was proper in that Congress could not possibly have intended to prohibit state and municipal employers from adopting age 55 as a mandatory retirement for local firefighters while, at the same time, authorizing compulsory retirement for federal firefighters at that same age. The Seventh Circuit rejected this argument. The court explained that the fact that Congress has determined that age 55 is an appropriate retirement age for one group of firefighters does not automatically establish that the same retirement age is a valid BFOQ under the ADEA for a wholly different group of employees. As a legal matter, the court emphasized, mandatory retirement schemes approved by Congress for federal employees are not subject to the strict requirements of the ADEA. Citing *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982), *Vance v. Bradley*, 440 U.S. 93 (1979), and *Starr v. Federal Aviation Administration*, 589 F.2d 307 (7th Cir. 1978), the court explained that the federal employee retirement schemes need only be rationally related to a permissible government objective, and must not be so unreasonable as to constitute an arbitrary and capricious exercise of legislative power. In contrast, to pass muster under the ADEA, compulsory retirement schemes must not only be rationally related, but also must be "reasonably *necessary*" to the operation of the particular business in question. Thus, the court concluded, "an employer seeking to justify its maximum retirement age as a valid BFOQ, must satisfy a much more stringent evidentiary test than the mere rationality requirement imposed on federal retirement schemes. 692 F.2d at 749-50. *See also Heiar v. Crawford County, Wisconsin, supra* (Mandatory retirement of deputy sheriffs at age 55 is not a BFOQ despite fact that federal retirement policy enacted by Congress sets 55 as retirement age for federal marshalls where county failed to establish that there is "'a factual basis' for believing that 'substantially all employees' aged 55 or older would be unable to perform their duties safely and efficiently because of the 'particularly arduous' nature of employment, and that medical or other objective tests to determine the capacity of older workers on any individual basis were unfeasible.")

Similarly, the County of Los Angeles attempted to justify its maximum hiring age for helicopter pilots in its sheriff and fire departments by contending that age was a BFOQ and arguing that any age-related restrictions tolerated in federal occupations should apply equally to similar state and local occupations. *EEOC v. County of Los Angeles*, 706 F.2d at 1041. The Ninth Circuit dismissed this contention on three grounds. First, concurring with the theory expressed by the Seventh Circuit in *Orzel*, the court explained that Congress, in establishing certain age restrictions applicable to federal employees, created an exception to the ADEA, and no BFOQ was necessary to justify the maximum age entry re-

quirements for *federal* law enforcement officers. 706 F.2d at 1041, *citing Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982). Second, quoting both footnote 17 of this Court's decision in *Wyoming*, and Chief Justice Burger's dissent, the Ninth Circuit recognized that in *EEOC v. Wyoming*, this Court considered and rejected the County's argument that age-related restrictions tolerated in federal occupations should apply equally to similar state and local occupations. Third, the court emphasized that "a factual foundation is necessary to establish that age is a BFOQ. . . . courts cannot assume, in the absence of any evidence as to its effects on performance, that age, *per se*, constitutes a BFOQ." 706 F.2d at 1042, *quoting EEOC v. County of Santa Barbara*, 666 F.2d 373, 376, 377 (9th Cir. 1982). *See also, Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir. 1984) (where the court, in passing, noted that in 1974, when Congress extended ADEA coverage to state and local governments, it also established mandatory retirement ages for a number of federal public safety occupations, 5 U.S.C. §8335, and further recognized that Congress need not adhere to ADEA standards in setting mandatory retirement ages for federal personnel. 738 F.2d at 40-41).

In *Tuohy v. Ford Motor Company*, 675 F.2d 842 (6th Cir. 1982) the Sixth Circuit expressly rejected the district court's conclusion that the Federal Aviation Administration's "Age 60 Rule", requiring the retirement of commercial pilots at age 60, was a *per se* BFOQ for non-commercial pilots, preempting further evidentiary inquiry into the reasonable necessity of Ford's analogous mandatory retirement scheme. The Sixth Circuit explained as follows:

> "The presence of an overriding safety factor might well leave a court to conclude as a matter of policy that the level of proof required to establish the reasonable necessity of a BFOQ is relatively low. However, this is quite different from dispensing with the requirement of necessity and holding that a BFOQ has been established as a matter of law because adoption [by another body] of a rule based on age was reasonable." 675 F.2d at 845 (citations omitted).



Accordingly, the court remanded the case for trial on the issue of whether safety considerations render an Age 60 Rule for the employer's pilots reasonably necessary. The court explained that to establish the reasonable necessity, the employer must present a factual basis for its determination that medical science cannot predict, on an individual basis, the likelihood that a pilot who has reached age 60 will become incapacitated during flight, and that there is a factual basis for believing that all pilots over age 60 are unable to perform their duties safely. 675 F.2d at 846.

Finally, the government employers in both *Orzel* and *County of Los Angeles*, sought review by this Court of the issue of whether federal statutes setting age 55 as the mandatory retirement age for certain federal employees establishes, as a matter of law that age 55 is a BFOQ under the ADEA. This Court denied the petitions for certiorari in both cases. *Orzel, cert. denied*, _____U.S._____, 104 S.Ct. 484 (1983); *County of Los Angeles, cert. denied*, _____U.S._____, 104 S.Ct. 984 (1984).

An irreconcilable conflict now exists between the Fourth Circuit's decision in this case, and the decisions of the Sixth, Seventh and Ninth Circuits, as well as inferences of the First Circuit. As a result, an intolerable situation has been created. It is a BFOQ, as a matter of law, to retire firefighters and law enforcement officers at age 55 in Baltimore and elsewhere in the Fourth Circuit. However, no such *per se* BFOQ exists for such employees in Wisconsin and Los Angeles. Accordingly, a Writ of Certiorari must issue to review and clarify the appropriate standards to be applied in all cases where the BFOQ defense is asserted in an attempt to justify a mandatory retirement age for state and local employees.

## CONCLUSION

For all the foregoing reasons, it is respectfully requested that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

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## OPINION OF COURT OF APPEALS

**Robert W. JOHNSON, August T. Stern, Jr., Thomas C. Doyle, James Lee Porter, Equal Employment Opportunity Commission, Mitchell Paris, and Robert L. Robey, Appellees.**

**v.**

**MAYOR AND CITY COUNCIL OF BALTIMORE, a Municipal Corporation, Appellant,**

**and**

**Hyman A. Pressman, as Chairman, and Donald D. Pomerleau, Calhoun Bond, Edward C. Heckrotte, Sr., Charles Daughterty, Paul C. Wolman, Jr., and Curt Heinfelden, as Members of the Board of Trustees, Fire & Police Employees Retirement System of the City of Baltimore, Defendants.**

**No. 81-1965.**

United States Court of Appeals,
Fourth Circuit.

Argued Sept. 1, 1983.
Decided April 4, 1984.

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L. William Gawlik, Asst. City Sol., Ambrose T. Hartman, Deputy City Sol., Baltimore, Md. (Benjamin L. Brown, City Sol., on brief), for appellant.

Paul D. Bekman, Baltimore, Md. (William H. Engelman, Harriet E. Cooperman, Kaplan, Heyman, Greenberg, Engelman & Belgrad, P.A., Baltimore, Md. on brief), and Justine S. Lisser, E.E.O.C., Washington, D.C. (David L. Slate, General Counsel, Vella M. Fink, Acting Associate Gen. Counsel, E.E.O.C., Washington, D.C. on brief) for appellees.

Before WINTER, Chief Judge, MURNAGHAN, Circuit Judge, and BUTZNER, Senior Circuit Judge.

MURNAGHAN, Circuit Judge:

Plaintiff, Robert W. Johnson, a Baltimore City firefighter, five of his fellows, and the EEOC, as intervenor, brought suit under the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.*, complaining that the Baltimore City pension provisions for firefighters impermissibly discriminated on grounds of age.[1] In their action, instituted on May 29, 1979, plaintiffs sought primarily an injunction prohibiting compelled retirement before an employee had reached sixty-five.

Plaintiff Johnson and four of the other five individual plaintiffs had attained the age of sixty years when the suit was filed.[2] A consensual temporary restraining order was entered permitting the five individuals to continue in active employment status with the fire department pending resolution of the case. When suit was brought, Plaintiff James L. Porter was only thirty years of age. The district court determined, however, that Porter had standing inasmuch as uncertainty as to the prospective mandatory retirement age could presently affect his decision whether to remain an employee of the fire department or to seek employment elsewhere. After a court trial, the district court entered judgment for the plaintiffs. *Johnson v. Mayor and City Council of Baltimore*, 515 F.Supp. 1287 (D.Md.1981), *cert. denied*, 455 U.S. 944, 102 S.Ct. 1440, 71 L.Ed.2d 656 (1982).

For some time, prior to 1962, the overall retirement system covering Baltimore City employees generally applied to firefighters. Under that plan, retirement was not mandatory until the employee had attained the age of seventy years. In 1962, however, the City established the Fire & Police Employees Retirement System (F & PERS), which in part provided pension benefits for all uniformed Fire Department personnel. The City obtained enabling legislation from the State of Maryland for the F & PERS at the urging of the union, to which the individual plaintiffs belonged.

[1] Complaint was also made of violations of the Fair Labor Standards Act, 29 U.S.C. §215 (an enforcement provision incorporated into the ADEA) and the equal protection clause of the Fourteenth Amendment to the United States Constitution, triggering violation of 42 U.S.C. §1983.

[2] The mandatory retirement age was generally 55, but, for those already employed as firefighters when the mandatory retirement age became effective, a transitional age of 60 was in effect.



Among the motivating factors for the adoption of the F & PERS was a belief that exposure to medical disablement in stressful circumstances increased with age. The F & PERS accordingly provided for mandatory retirement at the age of fifty-five (sixty in transitional cases involving firefighters in service on July 1, 1962, the date when the new plan went into effect).

[1] We first consider plaintiffs' claims based on the equal protection clause and 42 U.S.C. §1983. For Fourteenth Amendment purposes, plaintiffs have established neither inherent unreasonableness nor a denial of equal protection amounting to constitutional deprivations. The legislation was well within the discretionary powers of the deliberating body, state or federal, especially since "rationality" rather than "strict judicial scrutiny" is the test. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).[3]

The plaintiffs' complaint, in reality, boils down to an objection that there is too much equality in a requirement that all firefighters retire at fifty-five. The factual scenario is entirely devoid of any indicated attempt to punish individual employees or to seek an unwarranted advantage for the City. The City established the F & PERS in part to address concerns about the continued ability of the City's firefighters to respond efficiently and effectively to the demands of firefighting. The legislation simply reflected a preference for an inflexible age determination in lieu of case-by-case examination leading to decision on the individualized basis of each and every employee's medical condition, as monitored and remonitored from time to time.

We therefore conclude that (a) there are not sufficient grounds to support a determination that there has been a violation of the equal protection clause, and that (b) therefore, no basis exists for the award of remedies under 42 U.S.C. §1983.

We next consider plaintiffs' claim under the Age Discrimination in Employment Act of 1967. At the time the City established the F & PERS, the ADEA had not yet been enacted. The Act prohibits "various forms of age discrimination in employment, including the discharge of workers on the basis of age." *Equal Employment Opportunity Commission v. Wyoming*, _____ U.S. _____, _____, 103 S.Ct. 1054, 1058, 75 L.Ed.2d. 18 (1983); 29 U.S.C.

[3] This Court has already so concluded. *Arritt v. Grisell*, 567 F.2d 1267, 1271-72 (4th Cir.1977).

§623(a). In 1974 the ADEA was extended generally to the states and their political subdivisions as employers. 29 U.S.C. §630(b)(2). It also was made applicable to a number of federal instrumentalities, but not to the agencies hiring federal police or firefighters. *See* 29 U.S.C. §633a(a).

The Act initially protected workers between the ages of forty and sixty-five. 29 U.S.C. §631. In 1978, Congress raised the maximum age to seventy. Age Discrimination in Employment Act Amendments of 1978, 92 Stat. 189.[4]

The ADEA, however, does not flatly prohibit consideration by employers of age in all instances. Instead, consistent with its underlying purpose of eradicating *arbitrary* age discrimination, the Congress recognized that "criteria based on age are occasionally justified." *EEOC v. Wyoming*, _____U.S. at_____, 103 S.Ct. at 1058. The ADEA therefore deems lawful certain otherwise prohibited employment practices

> where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

29 U.S.C. §623(f)(1).

In *EEOC v. Wyoming*, *supra*, the Supreme Court provided guidance for determining the existence of a *bona fide* occupational qualification. There the Court considered the State of Wyoming's policy of mandatory retirement of its game wardens at age fifty-five. The Court rejected the state's contention that the Tenth Amendment,[5] as construed in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), rendered Wyoming immune from federal intervention with respect to the regulation of its game wardens.

The Court did not, however, declare the state's mandatory retirement age invalid under the ADEA. To the contrary, it reiterated that the mandatory retirement age could remain undisturbed if the state could prove that age was a *bona fide* occupational qualification for game wardens.

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[4] Plaintiffs, nevertheless, limit their request for relief to periods prior to their attaining 65.

[5] The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people."



> Perhaps more important, appellees remain free under the ADEA to continueto do *precisely what they are doing now*, if they can demonstrate that age is a "bona fide occupational qualification" for the job of game warden. [Citation omitted]. Thus, in distinct contrast to the situation in *National League of Cities*, *supra*, [426 U.S.] at 848 [96 S.Ct. at 2472], even the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, *but is merely being tested against a reasonable federal standard*.

*EEOC v. Wyoming*, _____U.S. at_____, 103 S.Ct. at 1062.[6] The Court remanded the case for a determination as to whether the mandatory retirement at fifty-five was in fact a *bona fide* occupational qualification, *i.e.*, did it satisfy a reasonable federal standard test.[7]

In light of the Court's disposition of *EEOC v. Wyoming*, we must initiate a search for a "reasonable federal standard" by which to test whether age is a *bona fide* occupational qualification for the City of Baltimore's firefighters. Congress has, however, made the search a simple one. With respect to federal firefighters, Congress has provided the standard. The same Congress that extended the ADEA to the states and their political subdivisions reinvigorated the requirement mandating retirement as a general matter at fifty-five[8] for federal police and firefighting employees. Pub.L. 93-350, 88 Stat. 356, 5 U.S.C. §8335(b).[9] The Legislative History accompany-

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[6] Emphasis supplied for the phrase "but is merely being tested against a reasonable federal standard."

[7] On remand, a jury found that mandatory retirement at fifty-five was a *bona fide* occupational qualification for Wyoming's game wardens. *See EEOC v. Wyoming*, No. C 80-0336 B (D.Wyo.1983).

[8] The age could be extended to sixty upon exemption in individual cases by the head of the federal agency involved.

[9] In pertinent part, 5 U.S.C. §8335(b) states:

(b) A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age . . . .

ing the passage of P.L. 93-350 reveals the Congressional concern for the taxing nature of firefighting endeavors:

> The history of retirement legislation dealing with law-enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age 50. This intent has been based on the nature of the work involved and the determination that these occupations should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service. They are occupations calling for the strength and stamina of the young rather than the middle age. Older employees in these occupations should be encouraged to retire.
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> Sen.Rep. No. 93-948, 93d Cong., 2nd Sess. in 1974 U.S.Code Cong. & Ad.News 3698, 3699.[10]

Where Congress itself has deemed age to be a *bona fide* occupational qualification for federal firefighters, we perceive no justification for ignoring the Congressional mandate in ascertaining "a reasonable federal standard" by which to measure firefighting in the City of Baltimore. Both federal and city firefighters are engaged in extremely stressful and hazardous activities designed to promote public safety. Absent a determination that age, specifically no more than fifty-five as a general rule, is a *bona fide* occupational qualification for firefighters, we would be compelled to conclude that Congress, in authorizing the automatic retirement of federal police and firefighting personnel, adopted an occupational qualification that is not, or might not be, *bona fide*. A court should not lightly make such a determination as to Congressional purpose.

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[10] Prior to the passage of the bill, Robert Hampton, then-chairman of the U.S. Civil Service Commission, provided the Senate Committee on Post Office and Civil Service with the Commission's views on the bill. In discussing the then-existing retirement scheme, Mr. Hampton observed:

> The present preferential computation for law enforcers and firefighters was proposed and justified as a means for keeping the service young by encouraging the retirement of persons who, because of the vigorous demands of their positions, are prematurely less able to perform required duties.
>
> . . . .
>
> The ineffectiveness of the present early law-enforcement retirement provision (in accomplishing its intended purpose of assuring a young, vigorous Federal law-enforcement organization) is readily apparent . . . .

*Id.* at [illegible]



[2] The existence of a Congressional determination of the reasonable federal standard for firefighters distinguishes the fact pattern in the instant case from that in *EEOC v. Wyoming*. No comparable federal statute exists insofar as federal game wardens are concerned. It therefore devolved upon the district court in *Wyoming* to ascertain, on remand, by consideration of conflicting expert testimony, the acceptability of the mandatory retirement provisions. Similarly, in the absence of Congressional guidance, a trial would have been necessary to determine whether the City's use of age is a *bona fide* occupational qualification for its firefighters. In such an instance, we might well be persuaded by the thorough, impeccably reasoned opinion, issued by Judge Alexander Harvey II after a bench trial below.[11] Instead, we reverse the decision below, in recognition of the fact that, by Congress' own reasonable federal standard, age is a *bona fide* occupational qualification for the job of firefighting in the City of Baltimore.[12]

[3] Our conclusion is compelled further by the well-established rule that resolution of an unresolved and serious constitutional question should be avoided if a reasonable statutory interpretation would lead to a result obviating the necessity for a resolution of an issue of basic law.[13] Here we avoid not one, but three, such potentially serious constitutional questions.

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[11] We note in passing that Judge Harvey rendered his decision almost two years prior to the Supreme Court's decision in *EEOC v. Wyoming*, *supra*.

[12] To the extent that the dissent may suggest that retirement of federal firefighters at age 55, under the provisions of 5 U.S.C. §8335(b), may be voluntary rather than mandated, I respectfully suggest that the actuality is otherwise, and was known by Congress to be so. Prior to enactment of the statute in 1974, the letter of Robert Hampton, referred to *supra* in n. 10, observed that under the bill which ultimately became 5 U.S.C. §8335(b) "employees in these occupations would *generally* be subject to *mandatory* retirement at age 55." (Emphasis supplied). The employees to whom reference was made were "employees whose duties are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States or employees whose duties are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus."

[13] "[W]hen the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

*United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369, 91 S.Ct. 1400, 1404, 28 L.Ed.2d 822 (1971), *quoting Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932).

First, for Judge Harvey, the power of Congress, under §5 of the Fourteenth Amendment, to extend the ADEA to state and local governments appeared to have been settled by this court's decision in *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977).[14] The validity of that conclusion, however, is questionable after *EEOC v. Wyoming*, *supra*.[15] We therefore perceive that the question is both unresolved and close as to whether §5 of the Fourteenth Amendment generates the power to permit, in the circumstances here presented, congressional extension of the ADEA to state and local governments.[16]

[14] ". . . after considering the legislative history . . . we conclude that in enacting ADEA and in extending it to the states Congress exercised its powers under §5 of the Fourteenth Amendment." *Id.* at 1269-71.

[15] In *EEOC v. Wyoming*, the Supreme Court relied exclusively on the Commerce Clause. Justice Brennan, writing for the bare majority of five justices, specifically left open whether the result could be reached "as an exercise of Congress's powers under §5 of the Fourteenth Amendment." *Id.*, ____U.S. at ____, 103 S.Ct. at 2064. However, Justice Stevens, concurring, concluded: "In final analysis, we are construing the scope of the power granted to Congress by the Commerce Clause of the Constitution." *Id.*, ____U.S. at ____, 103 S.Ct. at 1065. The four dissenting justices explicitly concluded that §5 of the Fourteenth Amendment was not a source of Congressional power. Since equality is apparent in a mandatory retirement at fifty-five provision applicable to all, enactment of a federal statute purporting to invalidate such state law may not readily be deemed to amount to enforcement of the provisions of the Fourteenth Amendment. That implies that there simply was not a majority for the proposition that §5 of the Fourteenth Amendment could be resorted to for purposes of extending the ADEA to the states and their political subdivisions, insofar as a mandatory retirement age of 55 for firefighters and policemen is concerned.

[16] It is to be observed that *Arritt v. Grisell*, *supra*, is not, itself, necessarily wrongly decided, only that it has, perhaps, been too broadly interpreted. It concerned a state law prohibiting outright any application for appointment to a position as a police officer by someone over 35 years of age. The plaintiff was 40. During the next fifteen or twenty, or more, years of his life, assuming he was qualified in all other respects, the inequality of treatment as between him on the one hand, and all police officers of his age or older on the other, would be irrational and, hence, patent. Such disparity might well constitute a denial of equal protection. If so, under §5 of the Fourteenth Amendment, extension of the ADEA to the state, to that extent, would, in any event, regardless of how the question might be resolved in the case *sub judice*, be permissible since there would be violation of a right protected by the Fourteenth Amendment. However, the mandatory retirement provisions, applicable at 55, reach all firefighters (save those in transition, all of whom, equally, must retire at 60), and an analogous difference in treatment of those similarly situated simply is not present.

The identical distinction from the case before us is applicable to *EEOC v. County of Los Angeles*, 706 F.2d 1039 (9th Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984) (All applicants 35 and older for positions as deputy sheriff or fire helicopter pilot automatically and invariably turned down).

*Cf. Stewart v. Smith*, 673 F.2d 485 (D.C.Cir.1982).



Second, the power of Congress under the Commerce Clause to extend the ADEA to City firefighters may yet remain unanswered after *EEOC v. Wyoming*. The mandatory retirement provision at issue in *EEOC v. Wyoming* affected only game wardens with statewide powers. *National League of Cities v. Usery*, *supra*, on the other hand concerned ". . . the States' abilities to structure employer-employee relationships in such areas as firefighters, police protection, sanitation, public health, and parks and recreation." *Id.* 426 U.S. at 851,[17] 96 S.Ct. at 2474.

The firefighters in the instant case were far more localized than state game wardens, being employees of a single political subdivision, and so more removed from the federal government and its national concerns. Each case was decided by a vote of five to four.[18] Whether the Supreme Court would view the City's firefighters as more akin to Wyoming's game wardens, or to the employees at issue in *National League of Cities v. Usery*, is again both an unresolved and narrow question, beyond the scope of this case as a con-

[17] The majority repeatedly expressed concern for "essential police and fire protection," *id.* at 846, "fire suppression endeavors," *id.*, and "fire prevention," *id.* at 851, 96 S.Ct. at 2474.

[18] The majority in *National League of Cities* consisted of Chief Justice Burger, and Stewart, Blackmun, Powell and Rehnquist, JJ., with Brennan, White, Marshall and Stevens, JJ. in dissent. Assuming that Justice Stewart's vote would have coincided with that of Justice O'Connor, the decision in *EEOC v. Wyoming* is the product of a shift in position of Justice Blackmun. "The key to understanding what remains of *National League of Cities* lies in the mind-set of Justice Blackmun, who was the only Justice to join the majorities in both *National League of Cities* and EEOC (but who neglected to explain his change of heart in EEOC) [footnote omitted]." *The Supreme Court, 1982 Term*, 97 Harv.L.Rev. 70, 206 (1983). We are particularly leery of seeking to resolve a close constitutional issue where such resolution requires the prediction as to how an individual Supreme Court Justice would vote. Especially is that so where one choice involves firefighters, the decision that the Commerce Clause power did not extend to them having been deemed by him to be "necessarily correct," and not impinging on "areas such as environmental protection," *see National League of Cities*, 426 U.S. at 856, 96 S.Ct. at 2476 (Blackmun, J. concurring), while the other involves game wardens, an occupation different in some not insignificant respects from that of firefighters.

sequence of our disposition on a reasonable grounds of statutory interpretation.[19]

Third, the constitutional separation of powers doctrine remains a viable restriction on the exercise of both legislative and adjudicative power. "[W]e consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government . . . ." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95, 101 S.Ct. 1571, 1582, 67 L.Ed.2d 750 (1981); *see generally Springer v. Philippine Islands*, 277 U.S. 189, 201-2, 48 S.Ct. 480, 482, 72 L.Ed.845 (1928). Congress has, in 5 U.S.C. §8335(b), adopted a legislative answer to the question of whether the purely chronological age of not over 55 is or is not a *bona fide* occupational qualification for firefighting. It is questionable whether we can constitutionally supply the answer instead by an adjudicative, case-by-case approach. The question appears to be the same when raised for firefighters, in San Francisco or in Baltimore.[20] The situation may not fit the intended accommodation of differing factual circumstances lending themselves to case-by-case resolution.

In the United States of America we are blessed with a Constitution which, both in words and in wise interpretation over the years, is intelligently flexible. It will bend before it breaks, displaying a

[19] The dissent has perceived "no substantial distinction between the firefighters in this case and the game wardens in *Wyoming*." It should be enough simply to point out in rejoinder that Congress *has* mandated retirement at 55 for firefighters but *has not* done so for game wardens.

Moreover, Justice Brennan, distinguishing, not overruling, *National League of Cities*, found, in *Wyoming*, "the degree of federal intrusion in this case is sufficiently less serious than it was in *National League of Cities*." A crucial difference is that one dealt with game wardens, the other specifically with firefighters, among others.

To supplement that proposition, one may ponder the consideration that it has been judicially recognized that "fire fighting is among the most hazardous of all occupations." *Aaron v. Davis*, 414 F.Supp. 453, 457, 462 (E.D.Ark.1976). Firefighters afford frontline protection against physical injury or death, not to mention property loss, through conflagration. The same cannot be said for game wardens, and impairment of state ability "to structure . . . integral operations," *Wyoming*, ____ U.S. at ____, 103 S.Ct. at 1062, is simply less evident in their case. Federal intrusion is indeed "minimal" in the case of game wardens. *Wyoming*, ____ U.S. at ____, 103 S.Ct. at 1065, n. 17.

[20] Could one properly denominate the approach "adjudicative," rather than legislative, if, depending on what two different "factfinders" decided, firefighters at Fort Meade, Maryland would have to retire at 55, while those at the Aberdeen Proving Grounds could continue to 70?



pliability enabling it to accommodate to new challenges and to address old, persistent problems. Still it cannot simply be altogether without structure. Too many repeated folds or creases can lead to a tear along one of the lines of stress. The concerns of a consititutional nature potentially present, if all should have to be addressed, might lead to an unfortunate rupture. Fortunately, we are spared the necessity to explore the three unclear issues of basic law to which we have alluded. We need not grapple with whether legislation would have led to enforcement of the provisions of the Fourteenth Amendment. We need not explore just how far principles extend in terms of the power of the federal government to impinge on the exercise of integral governmental functions by the states. Nor must we decide whether action in a particular area is legislative or judicial. "It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided." *United States v. Clark*, 445 U.S. 23, 27, 100 S.Ct. 895, 899, 63 L.Ed.2d 171 (1980); *see also Johnson v.Robinson*, 415 U.S. 361, 366-67, 94 S.Ct. 1160, 1165-1166, 39 L.Ed.2d 389 (1974).

We conclude, therefore, that the ADEA did not establish for the firefighters of Baltimore City a bar to mandatory retirement at age fifty-five (sixty for transitional cases). *EEOC v. Wyoming*, properly viewed, encourages the conclusion that the ADEA and 5 U.S.C. §8335(b) are not mutually exclusive or antagonistic, but should be read to exist in a harmonized way, especially when we thereby avoid close and unresolved constitutional questions.[21] Finally, by viewing the provisions of the City ordinance as properly

[21] *Cf. Bowman v. United States Department of Justice, Federal Prison System*, 510 F.Supp. 1183, 1186 (E.D.Va.1981), *aff'd by unpublished opinion*, No. 81-2143(4th Cir.1982); *Palmer v. Ticcione*, 576 F.2d 459, 465 n. 7 (2d Cir.1978).

Citing a quotation in *Wyoming* of *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), the dissent expresses the view that Congress may assert supremacy by requiring private parties to follow a legislative provision at odds with a federal statute imposing "mandatory retirement on a small class of its own workers." There is no doubt that such may be the case. But, when the problem arises in the context of whether Congress meant to force differing rules on one of its constituent sovereigns opposed to those applicable to itself in virtually identical circumstances it becomes far more likely that Congress has not so intended.

enforceable, we enhance the promotion of harmony between state and federal legislation.[22]

Accordingly, the judgments below are reversed and the case remanded for entry of judgments in favor of the defendants.

REVERSED.

HARRISON L. WINTER, Chief Judge, dissenting:

While I agree with the majority, for the reasons assigned by it that there is no merit in plaintiffs' claims based on the equal protection clause of the fourteenth amendment,[1] I do not agree that Congress has established a bona fide occupational qualification (BFOQ) for Baltimore City firefighters. Indeed, I question that what Congress has done with regard to federal employees has any relevance at all to a correct decision of this case. Of course, I recognize that the proscription of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621 *et seq.*, against mandatory retirement of employees under the age of seventy may be modified "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. §623(f)(1). The district court in the instant case, however, found as a fact that

[22] Numerous cases have addressed similar factual situations, apparently without such considerations in mind, simply assuming, without discussion, that (a) there was congressional power to extend the ADEA to all state or municipal employees, including firefighters, (b) the power had been fully exercised in enacting the ADEA, extending it to police and firefighters, and (c) without regard to the incongruity in treatment of federal and state firefighters, unless a b.f.o.q. was made out to the satisfaction of the factfinders, on an individual case-by-case basis, a mandatory retirement age imposed by a state or political subdivision was *ipso facto* illegal. The cases proceeding on the line advocated by the plaintiffs, and presenting the risk of differing results, case-by-case and political-subdivision-by-political-subdivision, lack persuasiveness for us inasmuch as they do not address the very questions which appear to be controlling. *E.g.*, *EEOC v. County of Los Angeles*, *supra*; *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir.1983); *EEOC v. City of St. Paul*, 671 F.2d 1162 (8th Cir.1982); *EEOC v. County of Santa Barbara*, 666 F.2d 373 (9th Cir.1982); *Aaron v. Davis*, 414 F.Supp. 453 (E.D.Ark.1976).

Other cases provide no assistance, inasmuch as they deal with private, not state or municipal employers. *E.g.*, *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir.1982); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir.1976); *contra*, *Maki v. Commissioner of Education of the State of New York*, 568 F.Supp. 252 (N.D.N.Y.1983).

[1] I am also in agreement with the district court and the majority that plaintiff James L. Porter, although only thirty-years old when suit was brought, had standing to sue.



a BFOQ for mandatory retirement before age seventy was not proved, and I do not think that its finding was clearly erroneous.

I therefore respectfully dissent.

I.

Baltimore City requires firefighters who became such after July 1, 1962 to retire at age fifty-five and all firefighters in service on July 1, 1962 to retire by age sixty. It is uncertain, however, at what age Congress has mandated retirement for federal firefighters. To me, certainty in what Congress has prescribed and exact comparability with what Baltimore has prescribed is the beginning point for determining if there is a congressionally established BFOQ for firefighters.

The legislation treating federal firefighters is set forth in 5 U.S.C. 8335(b) and it reads:

> A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.[2]

When §§8335 and 8336 are read together, it appears that a federal firefighter *may* retire as early as age fifty-five, *if* he has completed the minimum service requirements of §8336 so as to be entitled to

[2] Section 8336(c), referred to in the text of §8335(b), states:

(c)(1) An employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer of firefighter, or any combination of such service totaling at least 20 years, is entitled to an annuity.

(2) An employee is entitled to an annuity if the employee—

(A) was a law enforcement officer or firefighter employed by the Panama Canal Company or the Canal Zone Government at any time during the period beginning March 31, 1979, and ending September 30, 1979; and

(B) is separated from the service before January 1, 2000, after becoming 48 years of age and completing 18 years of service as a law enforcement officer or firefighter, or any combination of such service totaling at least 18 years.

an annuity (18 years), and *if* his department head does not conclude to require him to work a longer period. He may, however, be required to work until he reaches age sixty, and, indeed, he may be required to work beyond age sixty if (a) his department head is delinquent in giving him the 60 days' notice of separation, or (b) he has not completed 18 years of service as required by §8336(c)(2)(B). It is thus quite clear from the language of the statutes that Congress, unlike Baltimore City, has not opted for the bright-line test of age fifty-five as the mandatory age for retirement (except for certain transitional employees). This makes it impossible for me to say that there is a federally established BFOQ for firefighters at age fifty-five.

Section 8335 in its existing form was enacted in 1974 when, by Pub.L. 93-350, 88 Stat. 356, the mandatory retirement age of seventy was altered to the present alternatives. The legislative history of Pub.L. 93-350 does recite, as the majority sets forth, a congressional intent to liberalize retirement provisions so as to make it feasible for firefighters and law-enforcement officers to retire at age *fifty*. The rationale of the intent is, of course, "the vigorous demands of occupations which are far more taxing physically than most in the Federal Service." Sen.Rep. No. 93-948, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad.News 3698,3699. It must be remembered, however, that this language was used in relation to *voluntary* retirement, not *involuntary* retirment, as Baltimore City requires. With respect to involuntary retirement, the committee report states, "Additionally, the bill provides for the mandatory retirement of an eligible employee at age 55 or after 20 years, whichever occurs later." *Id.* at 3701. Thus, the legislative history, with its emphasis on "eligible" employee and resort to an alternative formula under which an employee may not be required to retire until he has completed twenty years of service, belies the existence of congressional intent, perceived by the majority, to fix age fifty-five as a BFOQ.

Even if it could be said that Congress established a BFOQ for federal firefighters, I do not think that this would be relevant to a decision of this case. The thesis of the majority was advanced and rejected in an analagous context in *EEOC v. Wyoming*, _____ U.S. _____, 103 S.Ct. 1054, 75 L.Ed.2d 18(1983). Footnote 17 of the *Wyoming* opinion, _____ U.S. at _____, 103 S.Ct. at 1063, 75L.Ed.2d at 33, discussed the possible application of the third prong of the inquiry delineated in *Hodel v. Virginia Surface Mining*



*& Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), for determining the immunity of a local government from an otherwise legitimate exercise of federal power to regulate commerce, i.e., that "it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional government functions'." *Hodel* at 288, 101 S.Ct. at 2366.

The footnote reads:

> Even if the minimal character of the federal intrusion in this case did not lead us to hold that ADEA survives the third prong of the Hodel inquiry, it might still, when measured against the well-defined federal interest in the legislation, require us to find that the nature of that interest "justifies state submission." *We note, incidentally, that the strength of the federal interest underlying the Act is not negated by the fact that the federal government happens to impose mandatory retirement on a small class of its own workers.* See Brief for Appellees 19. But cf. n. 5 supra (no upper age limit on Act's protection of federal employees.) *Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that declaration, and must from that point on evaluate the sufficiency of the federal interest as a matter of law rather than of psychological analysis.* (Emphasis added)

*Wyoming*, as I read it, tells us that the broad requirements of ADEA are not to be constricted as a matter of law by what treatment Congress has afforded to comparable federal employees.[3] Stated otherwise, the fact that Congress may require some federal firefighters to retire at age fifty-five does not excuse Baltimore from proving the facts necessary to satisfy 29 U.S.C. §623(f)(1).

[3] The majority also reads *Wyoming* as casting doubt on the power of Congress to extend ADEA to Baltimore firefighters and it justifies its holding as a result obviating the need for a constitutional adjudication. I disagree with this reading of *Wyoming*. I see no substantial distinction between the firefighters in this case and the game wardens in *Wyoming*. Since ADEA was held to be validly applied to the latter, the validity of application to the former would seem clear.

II.

Since in my view of the case there is no compelling federal BFOQ, I am brought to a consideration of the correctness of the district court's ground of decision. It found as a matter of fact that Baltimore had not proved a BFOQ for mandatory retirement of firefighters at age fifty-five. From my study of the record, I cannot conclude that this finding is clearly erroneous.

I would affirm the judgment of the district court.



# UNITED STATES COURT OF APPEALS

## FOR THE FOURTH CIRCUIT

NO. 81-1965

Robert W. Johnson, et al.,
Appellees,

versus

Mayor and City Council of Baltimore, etc.,
Appellant,

*and*

Hyman A. Pressman, etc., et al.,
Defendants.

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ORDER

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The appellees' petition for rehearing and suggestion for rehearing en banc has been submitted to the court. Upon the request for a poll of the court on the suggestion for rehearing en banc, Judges Russell, Widener, Hall, Murnaghan, Ervin and Chapman voted to deny rehearing en banc; Judges Phillips, Sprouse and Winter voted to grant rehearing en banc.

IT IS ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc has been denied by the panel.

Entered at the direction of Chief Judge Winter for a panel consisting of Chief Judge Winter, Judge Murnaghan and Judge Butzner.

For the Court,

/s/ JOHN M. GREACEN

CLERK

**Robert W. JOHNSON, August T. Stern, Jr., Thomas C. Doyle, Mitchell Paris, Robert L. Robey and James Lee Porter, Plaintiffs,**

**and**

**Equal Employment Opportunity Commission, Intervening Plaintiff,**

**v.**

**The MAYOR AND CITY COUNCIL OF BALTIMORE and Hyman A. Pressman, as Chairman and Donald D. Pomerleau, Calhoun Bond, Edward C. Heckrotte, Sr., Charles Daugherty, Paul D. Wolman, Jr. and Curt Heinfelder, members of the Board of Trustees, Fire and Police Employees Retirement System of the City of Baltimore, Defendants.**

**Civ. A. No. H-79-998.**

United States District Court,
District of Maryland.

June 9, 1981.

Frederick P. Charleston, Trial Atty., Equal Employment Opportunity Commission, Baltimore, Md., for intervening plaintiff.

Ambrose T. Hartman, Deputy City Sol., and Glenn M. Grossman and L. William Gawlik, Asst. City Sols., Baltimore, Md., for defendants.

Paul D. Bekman, William H. Engelman and Kaplan, Heyman, Greenberg, Engelman & Belgrad, P.A., Baltimore, Md., for plaintiffs.

ALEXANDER HARVEY, II, District Judge:

In this civil action, the six plaintiffs, who are Baltimore City fire fighters, are challenging provisions of the Baltimore City Code which require that certain Fire Department employees retire at the ages of fifty-five and sixty. Plaintiffs contend that this legislation (1) violates provisions of the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. §621, *et seq.*;[1] (2) contravenes 42 U.S.C. §1983; and (3) is violative of the Fourteenth Amendment. As relief, plaintiffs are seeking a declaratory judgment, a permanent injunction, back pay for plaintiff Johnson, attorneys' fees and costs.

Five of the six plaintiffs are presently over sixty years of age.[2] Had they not filed this suit, each of these five plaintiffs would now have been mandatorily retired, pursuant to applicable provisions of the Baltimore City Code. However, with the consent of the defendants, a Temporary Restraining Order has been entered in this case, permitting these five plaintiffs to retain their jobs and their employment benefits during the pendency of this action. The sixth plaintiff, James Lee Porter, is presently thirty-two years of age. He will be required to retire under the Baltimore City law in question in the year 2003, when he becomes fifty-five.

Named as defendants are the Mayor and City Council of Baltimore and the Chairman and members of the Board of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore (hereinafter the "FPERS"). Subsequent to the commencement of this action, the Equal Employment Opportunity Commission was permitted to intervene as a party plaintiff and has filed an intervening complaint. Following extensive pretrial proceedings, this case came on for trial before the undersigned Judge, sitting without a jury. Testimony was heard from expert and other

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[1] Plaintiffs also contend that the City ordinance violates 29 U.S.C.A. §215. However, that provision of the Fair Labor Standards Act is merely an enforcement provision incorporated into the ADEA. *See* 29 U.S.C. §626(b).

[2] Plaintiffs Johnson, Stern, Doyle, Paris and Robey are all over sixty years of age. Plaintiffs have complied with the exhaustion requirements of 29 U.S.C. §626(d).



witnesses, and numerous exhibits have been entered in evidence. Findings of fact and conclusions of law under Rule 52(a), F.R. Civ.P., are contained in this Opinion, whether or not expressly so designated.

I

*The challenged provisions of law*

Prior to 1962, employees of the Baltimore City Fire Department, like other municipal employees, were covered by the Employees Retirement System of the City of Baltimore (hereinafter the "ERS").[3] *See* Article 22, §§1-17, Baltimore City Code (as amended). This pension and retirement system contains a provision for mandatory retirement at age seventy.

Pursuant to enabling legislation enacted by the Maryland State Legislature, the Baltimore City Council, in 1962, approved an ordinance establishing a new retirement system for Fire Department and Police Department employees only, namely the FPERS, which is at issue here. The provisions applicable in this case, as set forth in Article 22, §34(a), Baltimore City Code (as amended), are as follows:

> (2) Any member in service who has attained the age of fifty-five shall be retired on the first day of the next calendar month after attaining such age, except that a member who has attained the rank of Fire Lieutenant or Police Sergeant, or equivalent grade as certified by the Department head and approved by the Board of Trustees, shall be retired when he has attained the age of sixty-five.
>
> * * * *
>
> (4) Further, anything in this subtitle to the contrary notwithstanding, any employee covered by this System, under the rank of Fire Lieutenant or Police Sergeant, or equivalent grade, who was in service on July 1, 1962, may be continued in service until attaining age 60.

In this suit, the plaintiffs contend that these provisions which require them to retire at ages fifty-five and sixty violate the ADEA, §1983 and the Fourteenth Amendment.

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[3] Employees of the City of Baltimore other than firefighters and policemen continue to be covered by ERS.

II

*Facts*

Plaintiff Robert W. Johnson commenced his employment with the Baltimore City Fire Department in October of 1943. On April 29, 1979, Johnson attained the age of sixty years. Under §34(a)(4), Johnson was retired involuntarily on May 1, 1979. This suit was filed on May 29, 1979. Pursuant to the Temporary Restraining Order entered by the Court, Johnson was restored to pay status on June 11, 1979.[4] In addition to the other relief sought by the other plaintiffs, Johnson seeks back pay from May 1 to June 11, 1979 in the amount of $1,000.00. Plaintiff August T. Stern, Jr. commenced his employment with the Fire Department in February 1946. He became sixty years of age on September 17, 1979. Plaintiff Thomas C. Doyle started working with the Fire Department in March of 1947, and became sixty years of age on October 7, 1979. Plaintiff Mitchell Paris commenced his employment with the Fire Department in December of 1946, and he attained the age of sixty on January 21, 1981. Plaintiff Robert L. Robey started working with the Fire Department on October 10, 1951, and became sixty on March 26, 1981. Plaintiffs Stern, Doyle, Paris and Robey have also been continued as Baltimore City firefighters pursuant to this Court's Temporary Restraining Order. Like plaintiff Johnson, they all desire to continue to work for the Baltimore City Fire Department beyond age sixty. Plaintiffs are not here challenging the right of the defendants to retire them involuntarily at age sixty-five, which is the mandatory retirement age under present law for Lieutenants and other officers of the Fire Department.

Plaintiff James Lee Porter commenced his employment with the Baltimore City Fire Department on May 6, 1969. On October 23, 2003, Plaintiff Porter will attain the age of fifty-five. Since he did not become a firefighter until after July 1, 1962, he will be required under the aforementioned §34(a)(2) and (4) to retire at age fifty-five whether he wishes to or not.

Plaintiffs Johnson, Stern, Doyle, Paris and Robey were all formerly members of the ERS. When the new ordinance establishing the FPERS was adopted by the City Council in 1962, these five plaintiffs, in 1962 or thereafter, chose to be covered by the new retirement system rather than the old.

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[4] Plaintiff Johnson is the only one of the plaintiffs whose employment has been interrupted. Thus, he is the only plaintiff seeking back pay.



III

*The ADEA*

When it enacted the ADEA in 1967, Congress included a statement of its findings and purpose in passing this legislation. 29 U.S.C. §621 provides as follows:

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§623(a)(1) is as follows:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; * * *

As originally enacted in 1967, the ADEA was not applicable to governmental entities. However, in 1974, Congress amended the Act to include states and political subdivisions within its coverage. The term "employer" now includes "a State or political subdivision of a State * * *" *See* 29 U.S.C. §630(b).

Certain employer practices were recognized by the Act as being lawful. §623(f)(1) provides as follows:

> (f) It shall not be unlawful for an employer * * * (1) to take any action otherwise prohibited under subsections (a) * * * of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age; * * *

As originally enacted in 1967, §623(f)(2) provided as follows:

> (f) It shall not be unlawful for an employer * * * (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual;

In 1978, §623(f)(2) was amended so that it now reads:

> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, *and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.* (Emphasis added.)

Congress added the language emphasized above for the express purpose of overruling the Supreme Court's decision in *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977). *See* House Conference Report 95-950, 95th Cong., 2d Session, [1978] U.S.Code Cong. and Admin. News, pp. 504, 529. In the *McMann* case, the Supreme Court had held that a bona fide pension plan established prior to the effective date of the ADEA could not be a subterfuge to evade the purposes of the Act. 434 U.S.



at 203. The 1978 amendment to §623(f)(2) makes it clear that the Act applies to FPERS, even though that retirement plan was established before the ADEA was enacted. Furthermore, as the Fourth Circuit noted in *EEOC v. Baltimore and Ohio R.R. Co.*, 632 F.2d 1107, 1112 (4th Cir. 1980), the 1978 amendment explicitly prohibits the provisions of §623(f)(2) from being utilized as a defense to involuntary retirement of protected individuals.

In this suit, plaintiffs assert that §34(a)(2) and (4) of Article 22 of the Baltimore City Code are contrary to §623(a)(1) and §623(f)(2) because the FPERS requires the involuntary retirement of each of them because of their age. Defendants contend (1) that the ADEA is unconstitutional; (2) that plaintiffs have waived their right to rely on the benefits of this federal statute; and (3) that pursuant to §623(f)(1), age is a bona fide occupational qualification for firefighters which is reasonably necessary to the normal operation of the Baltimore City Fire Department.

## IV

### *The constitutionality of the ADEA as applied to states and political subdivisions*

Relying on *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed. 2d 245 (1976), defendants first contend that the ADEA may not be constitutionally applied to employees of a state or political subdivision. As noted hereinabove, Congress amended the Act in 1974 to include states and political subdivisions within the definition of the term "employer", as used in the Act. *See* 29 U.S.C. §630(b).[5] Defendants contend that by extending the coverage of the ADEA to public employees in 1974, Congress has unconstitutionally usurped the regulation of essential government functions properly reserved to state and local governments.

Defendants' constitutional argument was previously rejected by the Fourth Circuit in *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977). In that case, a police officer in Moundsville, West Virginia had been denied employment by that city because he was forty years of age and therefore ineligible to take the required physical and mental examinations under West Virginia law, which had established an eighteen to thirty-five year age limit for such applicants.

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[5] This amendment became effective on May 1, 1974.

In an opinion written by Judge Thomsen, the Fourth Circuit reversed the District Court's entry of summary judgment in favor of the defendants and remanded the case to the lower court for the development of a full factual record concerning plaintiff's claim that the West Virginia statute violated the ADEA.

As in this case, the defendants in *Arritt* argued that the Supreme Court decision in *National League of Cities v. Usery, supra*, invalidated the 1974 amendments to the ADEA which extended coverage of its anti-discrimination provisions to state and local govnment employers. That decision of the Supreme Court had held that the extension of provisions of the Fair Labor Standards Act to state and local government employees engaged in areas of traditional governmental functions could not be upheld as a constitutionally valid regulation of interstate commerce because the Tenth Amendment limits exercise of the powers of Congress under the commerce clause. After considering the legislative history of the ADEA and the Supreme Court's opinion in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), the Fourth Circuit in *Arritt* upheld the 1974 amendments to the Act. Writing on behalf of the panel, Judge Thomsen concluded that in enacting the ADEA and extending it to the states, Congress had exercised its powers under §5 of the Fourteenth Amendment rather than under the commerce clause. 567 F.2d at 1270-1271.

[1,2] The recent *Arritt* decision is controlling in this case. As the Fourth Circuit there held, the 1974 amendments to the ADEA are not unconstitutional. Thus, the City of Baltimore is subject to the provisions of the ADEA, and if a city ordinance conflicts with provisions of this Congressional statute, the ordinance in question must fall.*

## V

### *Waiver*

Defendants next argue that even if the City of Baltimore and its Fire Department are subject to the provisions of the ADEA, the plaintiffs waived their right to rely on benefits conferred upon them by this Act when they voluntarily became members of the FPERS in 1962 or thereafter. In support of this contention, defendants assert that five of the plaintiffs contractually agreed to retire at age sixty when they became members of the FPERS.

* Other cases reaching the same conclusion include *Marshall v. Delaware River & Bay Authority*, 471 F.Supp. 886 (D.Del.1979); *Remmick v. Barnes County*, 435 F.Supp. 914 (D.N.D.1977); and *Usery v. Board of Education of Salt Lake City*, 421 F.Supp. 718 (D.Utah 1976).



In 1925, the City of Baltimore established the first actuarially funded pension system in Maryland for the general protection of municipal employees, known as "The Employees' Retirement System of the City of Baltimore" (the "ERS"). *See* Article 22, §§ 1-17, Baltimore City Code (as amended). That pension system, both then and now, contains a provision for mandatory retirement at age seventy. Both firefighters and policemen were covered by the ERS.

Following various studies supported by City firemen and their unions, a recommendation was made to the City Board of Estimates in 1960 that retirement benefits for members of the Fire Department should be liberalized. Following the enactment of enabling legislation by the State Legislature in 1961, an ordinance was introduced in 1962 before the Baltimore City Council, providing for the establishment of the Fire and Police Employees Retirement System (the "FPERS"). This legislation lowered the mandatory retirement age for firemen and police officers from age seventy to age fifty-five or sixty. A "grandfather clause" was included to permit firefighters, other than officers, who were in service on July 1, 1962 to continue to work until age sixty. Moreover, those in service on that date could, if they chose to do so, continue to be covered by the ERS. However, anyone who was employed after July 1, 1962 was required to retire at the age of fifty-five and was not permitted to be covered by the ERS. Officers of the Fire Department were permitted to continue until age sixty-five before being required to retire.

The proposed new ordinance was presented to the membership of both the Fire Department and the Police Department, and some 59% of the Fire Department personnel affected voted in favor of the new system. In June of 1962, the ordinance was passed by the City Council. Some members of the City Fire Department chose not to join the new system, but continued to be covered by the ERS. Others, including the plaintiffs, elected to become members of the FPERS. Plaintiffs Stern and Doyle joined the new system in 1962, while plaintiffs Robey and Paris did so in 1967. Plaintiff Johnson, in July 1962, initially decided to remain in the ERS, but in June of 1963, he elected to become a member of the FPERS. Defendants contend that when the plaintiffs elected to become members of the new system, they waived any rights they might have under the ADEA and voluntarily agreed to retirement at age sixty.

[3,4] Before a court can find that a federal right has been waived, it must be established that there was an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*,

304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). Courts indulge every reasonable presumption against waiver of fundamental rights, and a court cannot presume acquiescence in the loss of a fundamental right. *Id.* at 464, 58 S.Ct. at 1023.

These principles were recently applied by the Supreme Court in a case presenting the question of a claimed waiver of an employee's rights under Title VII of the Civil Rights Act of 1964. *See Alexander v. Gardner-Denver Company*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). In that case, the Supreme Court concluded that there could be no prospective waiver of an employee's rights under Title VII. Noting that an individual's right to equal employment opportunities represented a Congressional command that each employee be free from discriminatory practices, the Supreme Court pointed out that waiver of such a right would result in defeating the paramount Congressional purpose behind Title VII. 415 U.S. at 51-52, 94 S.Ct. at 1021. Accordingly, the Supreme Court concluded that an employee's rights under Title VII are not susceptible of prospective waiver.

[5] These principles are equally applicable here. Plaintiffs made their decisions to join the FPERS in 1962, 1963 and 1967. The ADEA was enacted by Congress in 1967, but it was not until 1974 that employees of state and local governments were included within provisions of the statute. In 1978, the law was again amended to preclude the involuntary retirement of an individual because of age pursuant to an established pension plan or seniority system. Under these circumstances, it can hardly be concluded that plaintiffs waived their rights under the ADEA by joining the FPERS between 1962 and 1967. In those years, they had no right to challenge provisions of the FPERS which required them to retire at age sixty or fifty-five, and therefore there was no known right for them to relinquish when they decided to join the new retirement system. Under federal standards, one may not relinquish intentionally an unknown right. *Nelson v. Peyton*, 415 F.2d 1154, 1158 (4th Cir. 1969), *cert. denied*, 397 U.S. 1007, 90 S.Ct. 1235, 25 L.Ed.2d 420 (1970); *Dodge v. Turner*, 274 F.Supp. 285, 289 (D.Utah 1967); *see Walker v. Peppersack*, 316 F.2d 119, 127-28 (4th Cir. 1963).

This Court's conclusion that plaintiffs have not waived their rights under the ADEA is supported by the Fourth Circuit's opinion in *McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976). In that case, the Court placed no significance on the fact that plaintiff could have chosen not to join the retirement plan claimed to violate the ADEA. 542 F.2d at 219, n.1.



[6] Nor is there merit to defendants' argument that plaintiffs are bound contractually to retire at ages sixty or fifty-five because they have agreed to the terms of the FPERS. A similar contention was rejected by Judge Miller of this Court in *Chastang v. Flynn & Emrich Co.*, 365 F.Supp. 957 (D.Md.1973). There, the argument had been made that the plaintiffs had waived their Title VII rights by executing releases. Judge Miller held that a statutory right "conferred upon a private party, but affecting the public interest may not be waived or released, if such waiver or release contravenes the statutory policy." 365 F.Supp. at 968. The same principles are applicable here.

For these reasons, this Court finds and concludes that the plaintiffs did not waive or surrender their rights under the ADEA when they joined the FPERS at various times between 1962 and 1967.

## VI

### *The bona fide occupational qualification defense*

The principal issue presented in this case and the one to which most of the evidence has been directed is whether age is a bona fide occupational qualification (hereinafter "BFOQ") for Baltimore City firefighters. This defense is specifically recognized by §623(f)(1), which permits an employer to take any action otherwise prohibited by the Act where age is a bona fide occupational qualification "reasonably necessary to the normal operation of the particular business * * *" Relying on this statutory provision, defendants contend that the Act is not violated by provisions of the Baltimore City Code which require that five of the plaintiffs retire at age sixty, whether or not they wish to do so.[7]

[7] This portion of the Opinion (Section VI) will discuss only the claims of the five plaintiffs who are presently over sixty years of age. Accordingly, the term "plaintiffs", as used in this Section, refers to all plaintiffs except Porter, whose claim will be discussed hereinafter. The term "firefighters" as used herein, includes emergency vehicle drivers and pump operators.

(a) *Prima facie case*

[7] Plaintiffs initially have the burden of establishing that their rights under the ADEA have been violated. A *prima facie* case of age discrimination is made out where a plaintiff proves (1) that he is a member of the protected group; (2) that he has been terminated; (3) that he has been replaced by a person outside the protected group; and (4) that he was qualified to do the job. *Marshall v. Baltimore & Ohio Railroad Company*, 461 F.Supp. 362, 372 (D.Md.1978), *aff'd in part and rev'd in part, EEOC v. Baltimore & Ohio Railroad Company*, 632 F.2d 1107 (4th Cir. 1980).

[8] In this case, there is little doubt that plaintiffs have fully satisfied this burden and have established a *prima facie* case under the ADEA. Plaintiffs, who are over sixty years of age, are members of the group protected by the Act. The employment of plaintiff Johnson has in fact been terminated, and the other plaintiffs would have been involuntarily terminated had this Court not entered a Temporary Restraining Order which continued their employment. Had the employment of the plaintiffs been terminated under the FPERS, younger persons would have taken their place. Finally, the evidence discloses that the plaintiffs, despite their age, are fully qualified to perform their duties as Baltimore City firefighters. No evidence to the contrary has been presented. Rather, the record in this case clearly establishes that plaintiffs' performance of their duties has been more than satisfactory.

For these reasons, this Court finds and concludes that plaintiffs have made out a *prima facie* case of age discrimination under the ADEA. As applied to them, the provisions of §34(a) which require that they retire involuntarily at age sixty violate the ADEA, unless defendants can prove that their acts under the Ordinance are not unlawful pursuant to §623(f)(1).

(b) *Defendants' burden*

[9] Once a plaintiff has made out a *prima facie* case of age discrimination under the ADEA, the burden shifts to the employer to establish a BFOQ defense. *Arritt v. Grisell, supra; Houghton v. McDonnell Douglas Corporation*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966, 98 S.Ct. 506, 54 L.Ed.2d 451 (1977).*

* In the *Houghton* case, the Eighth Circuit concluded that the employer's admission that the plaintiff's removal was solely on the basis of his age presented a *per se* violation of §623(a).



In *Arritt*, the Fourth Circuit rejected the standard adopted by the Seventh Circuit in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122, 95 S.Ct. 805, 42 L.Ed.2d 822 (1975), for measuring the burden assumed by the employer when a *prima facie* case of age discrimination has been made out. Rather, the Fourth Circuit adopted the two-pronged test formulated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976). Thus, in this case, the defendants have the burden to show (1) that the BFOQ which it invokes is "reasonably necessary to the essence of its business" of operating an efficient fire department within the City of Baltimore, and (2) that defendants have "reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class * * * would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis." 567 F.2d at 1271. In this case, the class involved includes all Baltimore City firefighters, other than officers, who are sixty but not yet sixty-five years of age. Defendants here must prove that there is a factual basis for believing that all or substantially all Baltimore City firefighters between sixty and sixty-five are unable to perform their duties safely and efficiently, or that Baltimore City firefighters between those ages may not possibly or practically be dealt with on an individualized basis.

In considering whether defendants have in this case met their burden of establishing a BFOQ defense, this Court must be guided by the objectives which Congress had in mind when it enacted the ADEA. Congress went so far as to expressly incorporate into the statutory language itself its findings that older workers find themselves disadvantaged in their efforts to retain employment, that the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and that the employment problems of older workers are grave. §621(a). Congress further expressly stated that the purpose of the ADEA is to promote the employment of older persons based on their ability rather than their age, to prohibit arbitrary age discrimination in employment and to assist employers and workers in finding ways to meet problems arising from the impact of age on employment. §621(b).

Recent opinions discussing the BFOQ defense asserted by an employer under §623(f)(1) indicate that the burden imposed on a defendant of establishing this affirmative defense is a substantial one. In *Houghton v. McDonnell Douglas Corporation, supra*, the Eighth

Circuit reversed the finding of the District Court that the employer of a test pilot had properly terminated his employment at age fifty-two, because age was a BFOQ defense for test pilots. Citing *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969), the Eighth Circuit concluded that to uphold the District Court's finding that defendant had met its burden in that case would allow the BFOQ exception to swallow the rule. 553 F.2d at 564. In *EEOC v. City of St. Paul*, 500 F.Supp. 1135, 1146 (D.Minn.1980), the Court, in concluding that age was not a BFOQ for fire chiefs of the City of St. Paul, noted that Congress "apparently intended that the bona fide occupational qualification be very narrowly construed, and thus applicable in very few cases. *See* 29 C.F.R. §860.102 (1980)." In *Sexton v. Beatrice Foods Co.*, 630 F.2d 478, 486 (7th Cir. 1980), the Seventh Circuit, in considering §623(f)(2), observed that exceptions of this sort to a remedial statute are to be narrowly and strictly construed.

(c) *Discussion*

On the record here, this Court finds and concludes that defendants have not met their burden of proving under §623(f)(1) that age constitutes a BFOQ for the requirement of §34(a) that the plaintiffs retire at age sixty. Defendants have not convinced this Court that the retirement of City firefighters at that age is reasonably necessary for the operation of an efficient fire department within the City of Baltimore. Furthermore, defendants have not shown, on this record, that there is a factual basis for them to believe that all or substantially all Baltimore City firefighters between the ages of sixty and sixty-five, other than officers, would be unable to perform their duties safely and efficiently. Finally, defendants have not proved that it is impossible or impractical to deal with firefighters between sixty and sixty-five on an individualized basis.

In attempting to meet their burden, defendants first emphasize the arduous nature of firefighting duties and the physical demands of the job. They point out that the duties of firefighters include periods of relative inactivity followed by those of intense physical activity. During a fire, plaintiffs and other firefighters are exposed to intense heat (or in winter, extreme cold), must work in smoke-filled environments in the presence of toxic substances and must perform their duties under great stress.



In the absence of other evidence in the record, these facts might have significance. However, when the record as a whole is considered, this Court is satisfied that defendants have not met their burden of proving that all or substantially all employees of the Baltimore City Fire Department cannot safely and efficiently perform their demanding duties between the ages of sixty and sixty-five.

Insofar as five of the plaintiffs are concerned, this case involves their performance for a period of only five years, namely their ability to perform their duties adequately at ages sixty through sixty-four inclusive. Plaintiffs are not here challenging the right of the defendants to require their mandatory retirement at age sixty-five. That is the age when officers of the Fire Department must retire, and plaintiffs are not contending that they have the right under the ADEA to work as firefighters beyond that age.[9] For these reasons, nothing in this Opinion should be construed as deciding whether the City of Baltimore has the right to require the mandatory retirement of Fire Department employees at age sixty-five.

The starting point in evaluating the job performance of Baltimore City firefighters after age sixty is the manner in which the plaintiffs themselves have performed since they attained that age. The evidence is overwhelming that plaintiffs have not only performed satisfactorily since they became sixty, but in most instances their performance has been more than satisfactory and even exceptional. Plaintiff Johnson is sixty-two years of age, plaintiffs Stern and Doyle are sixty-one and plaintiffs Paris and Robey are sixty. The evidence presented indicates that all five of these plaintiffs are today as qualified as younger employees of the Department to perform their duties as firefighters. Indeed, defendants have not sought to introduce any evidence to indicate that any one of the plaintiffs cannot carry out his assigned duties because of physical or other reasons. One Fire Department Captain testified that advancing age had not adversely affected plaintiff Stern's performance, and another Captain characterized Stern as being an "exceptional" firefighter today. Stern was rated as "outstanding" in his 1979-1980 performance evaluation report. Other evidence indicated that other plaintiffs were "good", "effective" or "very efficient" in the performance of their firefighting duties.

[9] Indeed, plaintiffs' evidence indicates that officers regularly perform at fires the same duties as firefighters of lesser rank and, conversely, that firefighters undertake officers' duties in the absence of the latter. Essentially, plaintiffs are seeking in this case the same mandatory retirement age that the City applies to officers of the Fire Department.

The testimony of firefighter Grove (who is not a plaintiff) supports that of the plaintiffs and the Fire Department officers who evaluated plaintiffs' performances. Grove is sixty-nine years of age and will have been with the Department for thirty-nine years when he retires in August of 1981 at age 70.[10] In a three-alarm fire that occurred in January 1981, Grove performed arduous firefighting duties over a period of four hours without difficulty. His testimony and that of the plaintiffs themselves supports this Court's findings on this record (1) that plaintiffs have performed their firefighting duties satisfactorily since they became sixty, and (2) that they may be expected to continue to so perform until they reach the age of sixty-five.[11]

Defendants' argument that substantially all Baltimore City firefighters would be unable at age sixty to perform their duties safely and efficiently is undercut by the fact that historically Baltimore firemen have always worked past that age and even up to age seventy. As discussed hereinabove, the ERS, established in 1925, did not require retirement until the age of seventy. Even when the FPERS became effective in 1962, many firefighters, like the witness Grove, chose to remain covered by the earlier system and, like Grove, have continued to perform their duties satisfactorily after they reached the age of sixty. This continued employment of firefighters beyond the age of sixty has in no way affected the high caliber of the services performed by the Baltimore City Fire Department. As Chief O'Connor testified, the Baltimore City Fire Department, prior to 1962, was rated as one of the best in the country, and it continues to be so rated. It is difficult to understand how such a rating could have been achieved if all or substantially all of the Department's firefighters over the age of sixty cannot now and could not for many years in the past perform their duties safely and efficiently.[12]

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[10] Grove chose to remain a member of the ERS and is therefore not required to retire under City law until he becomes seventy years of age.

[11] Plaintiff Robey was actively engaged in fighting a major fire between 12:00 midnight and 7:00 A.M. on April 24, 1981, which was only three days before this case came on for trial.

[12] At the present time, there are eight City firefighters who are between the ages of sixty and seventy, and sixty-five who are between the ages of fifty-five and fifty-nine.



The further question raised is why an effort was not made at an earlier date to fix a retirement age of sixty, if the risk to the public was as great as defendants now contend. If anything, the burdens undertaken by an older firefighter are less today than they were in prior years. In 1953, firefighters worked a 66-hour week, but this has been reduced over the years to the present 48-hour week. Moreover, technological improvements over the years, including in particular the widespread use of oxygen breathing apparatus,[13] have made the job less onerous for both older and younger members of the Department.

Defendants' selection of the arbitrary age of sixty for the mandatory retirement of Baltimore firefighters is particularly suspect in view of what other municipal fire departments have done. A survey of the mandatory retirement ages of fire department personnel in thirty of the largest cities in the United States indicates that only four cities have a mandatory retirement age of sixty. Twenty-two cities have a retirement age of sixty-five or older or have no mandatory retirement age at all for firefighters.[14] Nothing in the record indicates that Baltimore Fire Department personnel perform duties any more arduous than those undertaken in other cities. To accept defendants' contention that substantially all firefighters above age sixty cannot safely and effectively perform their duties would indicate that a large number of fire departments across the country are inadequately or improperly manned.

Defendants rely very heavily in this case on the medical evidence they have produced. Defendants argue that disease processes in persons aged fifty-five or older preclude the safe and efficient performance of their duties by firefighters over that age and that these medical conditions cannot be ascertained by means other than knowledge of the individual's age. It is assertd that the mandatory requirement of City law that firefighters retire at age fifty-five or sixty is based on sound physiological and medical data and is the most reliable way to remove firefighters with coronary disease from the Fire Department. Defendants contend that the expert testimony presented by them proves that it is impossible or highly impractical to deal with the retirement of Baltimore City firefighters over sixty on an individualized basis.

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[13] This apparatus is designed to protect firefighters from smoke, carbon monoxide and other harmful gases at the scene of a fire.

[14] Three cities require retirement at age sixty-three or sixty-four. Baltimore was the only city with a fifty-five year old retirement age for firefighters.

On the record here, this Court finds and concludes that defendants have not met their burden of proving that it is impossible or highly impractical to deal with the retirement of Baltimore City firefighters between the ages of sixty and sixty-five on an individualized basis. As to this issue, the expert testimony presented by plaintiffs was much more convincing than that of defendants. In particular, this Court found Dr. Samuel M. Fox, III to be a most impressive witness, and his testimony will be credited in substantial part. Dr. Fox is an experienced cardiologist who specializes in exercise testing.[15] He testified that the chronological age of an individual must of course be considered but that it is not determinative of that individual's ability to perform duties such as those required of a firefighter. Rather, exercise tolerance test, supplemented by other tests and procedures if necessary, should be and can be used to determine whether a firefighter is physically and medically fit to perform his duties. Because of technological improvements in recent years, physicians can today much more readily test for cardiological problems which a fireman or other similar worker might have.

The testimony of Dr. Fox is supported by that of both Dr. Paul O. Davis[16] and Dr. Ellsworth R. Buskirk.[17] Neither of these witnesses is a physican, but both have extensive experience in exercise physiology. This Court accepts their testimony that age should not be the determining factor in ascertaining whether an individual between sixty and sixty-five is capable of performing physical tasks such as those required of a firefighter.[18] These witnesses conceded that increasing age unquestionably has an effect on physical performance and that aerobic capacity decreases with age.[19] But decrease-

[15] Dr. Fox is a Professor of Medicine at Georgetown Univesity School of Medicine, was formerly a member of the President's Council on Physical Fitness and Sports and is a past President of the American College of Cardiology. These are only a few of his many accomplishments.

[16] Dr. Davis is particularly well qualified to testify concerning the duties required of a firefighter. He has been an active member of the Takoma Park (Md.) Fire Department since 1966.

[17] Dr. Buskirk is a Professor of Applied Physiology at The Pennsylvania State University.

[18] It was Dr. Davis' opinion that it is both possible and practical to determine plaintiffs' capacity and ability to continue to perform their jobs safely and efficiently by means of medical examinations, periodic reviews of current job performance and other objective tests.

[19] After age seventy, deterioration in physical performance is more rapid. This fact has little significance in this case.



ing physical ability is offset by the experience and knowledge which an older employee has gained over the years. An older, more experienced firefighter is better equipped to pace himself and is more knowledgeable concerning unnecessary risks than the younger. Indeed, the evidence in this case indicates that younger firefighters receive more physical injuries than do older ones, apparently because younger firefighters assume more unnecessary risks.

Plaintiffs' expert witnesses also readily concede that firefighters as a class are particularly subject to heart disease and that the risk of heart disease increases with age. But facts such as these do not under the ADEA permit defendants to stereotype City firefighters between the ages of sixty and sixty-five and conclude that all or substantially all of them are no longer capable of performing their assigned duties safely and efficiently. As the Court said in *Aaron v. Davis*, 414 F.Supp. 453 (E.D.Ark. 1976), at page 461:

> Generally, it is the relative ease with which possibly incapacitating defects are detectable that determines whether the qualifications imposed by the employer are job-related or "reasonably necessary to the normal operation of the particular business," as provided in the Act. In this area, a claim for exemption from the statute's proscriptions will not be permitted on the basis of the employer's *stereotyping assumption* that most, or even many, employees in a particular type of job become physically unable to perform the duties of that job after reaching a certain age. *See Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th.Cir. 1969). (Emphasis added)

The ADEA recognizes that stereotyping assumptions of an employer are not acceptable unless it is impossible or highly impractical to deal with members of a given class on an individualized basis. As the testimony of plaintiffs' experts indicate, it is both possible and practical to determine whether an individual firefighter between the ages of sixty and sixty-five is physically disabled from performing his assigned duties. In most cases, the cost of such testing is not great, and some of this cost will be paid under the Fire Department Health Care Program. Conventional risk factors can first be determined by way of interviews, and, in many instances where recognized risk factors are absent, further testing would not be required. Where indicated by the presence of one or more risk factors, a firefighter sixty years of age or older can take an exercise tolerance

test (also referred to in testimony as an exercise stress test). As Dr. Fox testified, this is not an expensive test, and more expensive and more invasive testing mechanisms need be employed only in those instances where it is indicated that follow-up testing is required.[20]

The expert testimony relied upon by the defendants was less convincing than that of the plaintiffs. Neither Dr. Albert M. Antlitz nor Dr. Earl W. Ferguson has the experience that Dr. Fox has had in both cardiology and exercise tolerance testing. In his testimony, Dr. Antlitz indicated that he himself had examined a sixty-three year old officer of the Fire Department to determine whether that individual should be retired. Following his examination of sixty-three year old Fire Lieutenant Anthony V. Herr in 1978, Dr. Antlitz concluded that the cardiac status of this Fire Department officer, who had stopped working because of hypertension, would permit him to engage in his usual work as an officer with a truck company. However, at the trial, Dr. Antlitz testified that since 1978 he had learned what lieutenants now do in fire companies and that today he would not let Lt. Herr go back to fighting fires at age sixty-three. Thus, defendants' own evidence indicates that Fire Department personnel with cardiac problems can be evaluated on an individualized basis and retired if necessary. Other evidence in the record shows that examinations of the sort described by Dr. Antlitz (and testing, if necessary) could be successfully performed for plaintiffs and other firefighters between sixty and sixty-five years of age.

Dr. Alexander R. Lind, a physiologist called to testify by defendants, based his conclusion that substantially all firefighters over fifty-five could not properly perform their duties in large part on his study of miners in South Africa.[21] Such individuals hardly composed an appropriate class for comparison with Baltimore City firefighters, since all of the miners studied were black and worked full eight-hour shifts in mines where it was very humid and where the temperature ranged from 85° to 100°.

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[20] These more expensive and more invasive follow-up tests include radionuclide imaging and cardiac catheterization.

[21] Dr. Lind testified in *Houghton v. McDonnell Douglas Corporation, supra*. In reversing the District Court's conclusion that defendant had met its burden in that case, the Eighth Circuit characterized the Company's evidence as being "of a general nature."



What the ADEA requires in a case involving municipal workers like firefighters is a balancing of the right of each individual employee to continue to work in spite of his age against the risk to the public and to other employees created by the nature of the duties to be performed. As the Court said in *Aaron v. Davis, supra*, at 461:

> It is apparent that the quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public or fellow employees inherent in the requirements and duties of the particular job. Stated another way, where the degree of such risks is high and methods of avoiding same (alternative to the method of a mandatory retirement age) are inadequate or unsure, then the more arbitrary may be the fixing of the mandatory retirement age.

In support of its conclusions in this case, this Court would cite and rely on both *Aaron v. Davis, supra* and *EEOC v. City of St. Paul, supra*. Both of those cases dealt with the rights of firefighters under the ADEA. In *Aaron*, an ordinance of the City of Little Rock required that all members of the fire department retire at age sixty-two. Following a trial, Chief Judge Eisele concluded that the record did not support the special relevance of the age sixty-two mandatory retirement requirement of the Little Rock ordinance. Accordingly, the Court held that the provisions of the ordinance in question were arbitrary, capricious and wholly lacking in any justifiable business necessity. 414 F.Supp. at 463.

In *City of St. Paul, supra*, a Minnesota statute and an ordinance of the City of St. Paul had established a mandatory retirement age of sixty-five for all uniformed fire department employees. Following a trial, District Judge Alsop held that provisions of this legislation requiring Fire Chiefs to retire at age sixty-five violated the ADEA. Noting that the only Chief over age sixty-four about whom testimony had been presented could adequately perform his duties, the Court found that the evidence in the case did not give the City of St. Paul a factual basis for believing that substantially all Chiefs were unable to perform their duties safely and efficiently after the age of sixty-four. 500 F.Supp. at 1145.

In *City of St. Paul*, the Court upheld the challenged legislation insofar as it required the retirement of firefighters and captains at age sixty-five. 500 F.Supp. at 1144. Defendants argue that this part

of the decision supports their contention that age is a BFOQ for firefighters. This Court would disagree. There is no inconsistency between this Court's decision that defendants have not on the record here met their burden of proving that retirement at age sixty is a BFOQ for firefighters and Judge Alsop's conclusion that the defendants in *City of St. Paul* had met their burden concerning such compulsory retirement at age sixty-five. Certainly as an employee's age increases, there is a decrease in the quantum of proof necessary for an employer to meet its burden of proving a BFOQ under §623(f)(1). *Aaron v. Davis, supra* at 461. Plaintiffs have not in this case (as did the plaintiffs in *City of St. Paul*) sought to work beyond age sixty-five. Nothing contained herein is intended to suggest that Baltimore firefighters could not be required by the City to retire at age sixty-five, since that question is not before the Court in this case. The issue here has been whether defendants have met their burden of proving that retirement at age sixty is a BFOQ for City firefighters. This Court finds that they have not.

In sum, the Baltimore City law in question, as applied to these plaintiffs and others like them, violates the ADEA because it sets an arbitrary age limit for terminating the plaintiffs' employment. As they have done all their lives, plaintiffs keenly wish to continue to work as firefighters until they are sixty-five. Section 34(a) does not permit plaintiffs' performance to be measured in terms of their ability. Rather, an arbitrary line has been drawn based on stereotyped assumptions. Plaintiffs have been told that solely because of their age, their services are no longer required. In this case, defendants have failed to meet their burden of proving that, when a firefighter becomes sixty, age is an occupational qualification reasonably necessary to the normal operation of the Baltimore City Fire Department. The provisions of §34(a)(2) and (4) of Article 22 of the Baltimore City Code, as applied to plaintiffs and others like them, therefore violated the ADEA.

## VII

### *The claim of the plaintiff Porter*

Plaintiff Porter is the only one of the six plaintiffs in this case who was not employed by the Fire Department on July 1, 1962. Under §34(a)(2), he must therefore retire at age fifty-five. Defendants contend that since plaintiff Porter is presently thirty-two years of age, he is not a proper plaintiff in this suit.



Defendants argue that plaintiff Porter is not one of those persons protected by the ADEA, since the prohibitions of the Act are limited "to individuals who are at least forty years of age but less than seventy years of age."[22] 29 U.S.C. §631. However, when read together with the rest of the statute, this provision does no more than define the acts prohibited by the statute and would not deprive plaintiff Porter of standing in this case. If Porter survives and is still employed by the Fire Department when he attains the age of fifty-five, he will clearly be protected by the Act. More importantly, since this Court has found that the provisions of §34(a) which mandate retirement of a City firefighter at age sixty violate ADEA, *a fortiori* the provisions of the legislation which mandate that plaintiff Porter must retire at age fifty-five are likewise invalid.

The essential question which must be addressed in determining whether plaintiff Porter has standing is whether his claim is now ripe for adjudication. Defendants assert that since Porter will not have to retire until the year 2003, his claim is too speculative to be considered by this Court at this time. Relying on *Eccles v. Peoples Bank*, 333 U.S. 426, 68 S.Ct. 641, 92 L.Ed.2d 784 (1948), defendants argue that there are many contingent events which might occur before plaintiff Porter is required to retire, and that the occurrence of any one of these events would render moot any decision made by this Court as to him.

[10,11] When the legislation in question is considered from a practical point of view, this Court concludes that abstract concepts of justiciability should be disregarded. This suit challenges provisions of §34(a) of Article 22 of the Baltimore City Code. Two groups of employees are affected by the legislation, those who joined the Fire Department prior to July 1, 1962 and those who, like plaintiff Porter, began their employment after that date. The provisions of the law applying to these two separate groups are hardly severable. Quite obviously, if the ADEA invalidates provisions of the City Code which require mandatory retirement of a firefighter at age sixty, that Act likewise invalidates similar provisions mandating retirement at age fifty-five. The principle of statutory severability plays a special role when a court is presented with questions of ripeness. *See* Wright, Miller & Cooper, *Federal Practice and Procedure*, §3532 at 258 (1975). Inseverabilty, therefore, may make ripe issues that otherwise would be better deferred. *Id.* at 259; *see Carter v. Carter Coal Company*, 298 U.S. 238, 56 S.Ct. 855, 80

[22] The 1978 Amendments to the Act increased the top age limit from sixty-five to seventy.

L.Ed. 1160 (1936). As the Court of Appeals of Maryland said in *Heubeck v. Mayor and City Council of Baltimore*, 205 Md. 203, 211, 107 A.2d 99 (1954), an Act must fall entirely if the effect of declaring a portion of it invalid would render the remainder incapable of effecting the purpose for which the Act was enacted.

Under the particular circumstances of this case, considerations of judicial economy lead this Court to the conclusion that plaintiff Porter's claim is ripe for determination at this time. It would make little sense, in view of the findings and conclusions made herein, to defer consideration of Porter's claim until a later date. Accordingly, plaintiff Porter is entitled to a declaratory judgment and injunction prohibiting defendants from enforcing provisions of §34(a) which mandate that he must retire at age fifty-five.

## VIII

### *Plaintiffs' other claims*

In view of this Court's conclusion that §34(a)(2) and (4) of Article 22 of the Baltimore City Code violates provisions of the ADEA, it is not necessary to determine whether this City law likewise contravenes 42 U.S.C. §1983 and the Fourteenth Amendment. However, it should be noted that the Fourth Circuit's decision in *Arritt v. Grisell, supra*, makes it very doubtful that plaintiffs would prevail insofar as their alternative claims are concerned.

[12] In the second part of he *Arritt* opinion (567 F.2d 1271-1272), the Fourth Circuit upheld the District Court's granting of summary judgment in favor of the defendants as to plaintiff's claim that the West Virginia statute violated §1983 by denying the plaintiff's right to the equal protection of the laws. Relying on *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), the Fourth Circuit concluded that it could not be said that the age limitation contained in the West Virginia statute did not rationally further a legitimate state purpose insofar as the claim based on the equal protection clause, as distinguished from the statutory claim under the ADEA, was concerned. As Judge Thomsen pointed out, there is no inconsistency in concluding that a statute violates the ADEA but does not violate the Equal Protection Clause of the Fourteenth Amendment, since legislation "authorized by §5 of the Fourteenth Amendment can prohibit practices which would pass muster under the Equal Protection Clause, absent an act of Congress." 567 F.2d at 1272.



In any event, in this case, it is not necessary to consider in detail the arguments presented by the plaintiffs in seeking to distinguish this case from *Arritt* and *Murgia*. Plaintiffs are entitled to the relief they seek under the ADEA, and there is therefore no need for this Court to go on and undertake to analyze the evidence in terms of plaintiffs' claims asserted under §1983 and the Fourteenth Amendment.

## IX

### *Conclusion*

For the reasons stated, plaintiffs are entitled to the relief they seek. Plaintiff Johnson is entitled to a judgment in the amount of $1,000.00, representing back pay due him from May 1 to June 11, 1979. All plaintiffs are entitled to a declaratory judgment, a permanent injunction and costs. In addition, plaintiffs are entitled to attorneys' fees in an amount to be determined by the Court at a later date. Counsel should meet and undertake to agree on the form of an Order to be entered herein.

# THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, AS AMENDED* (29 U.S.C. 621, et seq.)

## PROHIBITION OF AGE DISCRIMINATION

Sec. 4.(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) it shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age,

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employee to discriminate against an individual in violation of this section.

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership because such individual, member or applicant

for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, *and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual;* or

(3) to discharge or otherwise discipline an individual for good cause.





§8335. Mandatory separation

(a) An air traffic controller shall be separated from the service on the last day of the month in which he becomes 56 years of age. The Secretary of Transportation, under such regulations as he may prescribe, may exempt a controller having exceptional skills and experience as a controller from the automatic separation provisions of this subsection until that controller becomes 61 years of age. The Secretary of Transportation shall notify the controller in writing of the date of separation at least 60 days before that date. Action to separate the controller is not effective, without the consent of the controller, until the last day of the month in which the 60-day notice expires.

(b) A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

(c) An employee of the Alaska Railroad in Alaska and an employee who is a citizen of the United States employed on the Isthmus of Panama by the Panama Canal Company or the Canal Zone Government, who becomes 62 years of age and completes 15 years of service in Alaska or on the Isthmus of Panama shall be automatically separated from the service. The separation is effective on the last day of the month in which the employee becomes age 62 or completes 15 years of service in Alaska or on the Isthmus of Panama if then over that age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

(d) The President, by Executive order, may exempt an employee from automatic separation under this section when he determines the public interest so requires.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 571; Pub.L. 92-297, §4, May 16, 1972, 86 Stat. 144; Pub.L. 93-350, §4, July 12, 1974, 88 Stat. 356; Pub.L. 95-256, §5(c), Apr. 6, 1978, 92 Stat. 191.



Fire and Police Employees Retirement
System of the City of Baltimore

Baltimore City Code,
Article 22, Section 29 *et seq.*

Section 34(a)

34. Benefits.

(a) *Service retirement benefits.* (1) Any member in service may retire upon his written application to the Board of Trustees setting forth at what time, not less than thirty days nor more than ninety days subsequent to the execution and filing thereof, he desires to be retired, provided that the said member at the time so specified for his retirement shall have attained the age of fifty or shall have rendered twenty-five years of creditable service as an employee, and notwithstanding that, during such period of notification, he may have separated from service.

(2) Any member in service who has attained the age of fifty-five shall be retired on the first day of the next calendar month after attaining such age, except that a member who has attained the rank of Fire Lieutenant or Police Sergeant, or equivalent grade as certified by the Department head and approved by the Board of Trustees, shall be retired when he has attained the age of sixty-five.

(3) Anything in this subsection to the contrary notwithstanding, any employee who becomes a member at the time of the establishment of this system, and who is fifty-five, or more, years of age, or who will attain the age of fifty-five years before having twenty-five years of creditable service, may be continued in service until the completion of twenty-five years of creditable service, or the attainment of age sixty-five, whichever occurs first.

(4) Further, anything in this subtitle to the contrary notwithstanding, any employee covered by this System, under the rank of Fire Lieutenant or Police Sergeant, or equivalent grade, who was in service on July 1, 1962, may be continued in service until attaining age 60.